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In the Supreme Court of the United States

OCTOBER TERM, 1956

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT *v.* CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, W. VA., PETITIONER *v.* WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR APPELLANT AND PETITIONER ON REHEARING

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v.

CLARICE B. COVERT

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NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KREEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR APPELLANT AND PETITIONER ON REHEARING

GENERAL POSITION OF THE GOVERNMENT

We do not undertake in this supplemental brief to reargue matters already covered in the other briefs

filed in these cases. This brief considers only those points on which the Court invited discussion in its order of November 5, 1956, granting the petition for rehearing. 352 U. S. 901. At the outset, however, for the convenience of the Court, we restate briefly our general position on the constitutionality of Article 2 (11) of the Uniform Code of Military Justice and indicate how the points discussed in this brief bear on that analysis.[1]

It is basic to all problems in this case to recognize that, since Article 2 (11) relates to civilians accompanying the armed forces into territory over which the United States is not sovereign, the problem cannot be considered in terms of United States law alone; even in its military aspects, it is a problem of the power of the United States in international relations. This is to some degree even more true in time of peace than in time of war. When the United States is waging war, and particularly when in that process its troops are in enemy territory, it is acting under its own power to wage war. But United States troops and their civilian components cannot, in time of peace, even be present in the territory of a foreign power without the consent of that state. The right of this country to transport, house and control both its troops and the civilian components thereof stems from international law, negotiation, and agreement.

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[1] See, also, for a brief general statement of our position, the Memorandum in Reply to Petition for Rehearing, filed in October 1956.

On this foundation, we believe that the court-martial jurisdiction of civilians accompanying the armed forces into foreign territory may be sustained on two independent (although interrelated) constitutional grounds—(1) as a reasonable and proper exercise of the powers of the United States in the conduct of foreign affairs, and (2) as a reasonable exercise, in the light of the practical position of military dependents and employees in foreign territory, of the power conferred by Article I, section 8, clause 14, of the Constitution to make rules for the government of the land and naval forces.

1. Under international law each nation has jurisdiction over offenses committed within its own territory. The United States can exercise adjudicatory power on foreign soil only when and to the extent that the foreign nation consents that the United States may do so. Under these circumstances there is the initial question whether every American over whom the United States has acquired adjudicatory power outside the continental limits of the United States must be indicted by a grand jury and tried before a jury by an Article III court. This Court has held (*In re Ross*, 140 U. S. 453) and petitioner has conceded that they need not.[2] The Constitution does not

[2] The difference in circumstances between those of the consular courts upheld in *In re Ross* and those of courts-martial today certainly does not affect the underlying holding that, where American judicial power is exercised abroad, it may be done through means other than an Article III court. In fact, if the strict requirements of an Article III court were not applicable where the United States had greater freedom of action, as in the

require trial before an Article III court in a foreign country for offenses committed there by an American citizen. Congress may establish legislative tribunals to exercise whatever jurisdiction the United States may have to try such Americans abroad.

So much would appear basic and almost beyond dispute. The precise question before the Court, therefore, is whether, when the United States has obtained from a foreign country the right to try its national on foreign soil for a crime committed on foreign soil, that right may be implemented through the existing court-martial system in relation to civilians accompanying the armed forces. We believe that nothing in the Constitution—no particular clause and nothing in its structure or spirit—prohibits the selection of a military tribunal for such civilians simply because it is military in character. The historical evidence discussed below bears on this, as well as the history discussed in our other briefs showing that some civilians have always been recognized as subject to military discipline. The question is solely whether the legislative judgment in selecting the particular tribunal was reasonable in the circumstances.

It is our view not only that the choice of a military tribunal is intrinsically reasonable for such persons, but that, in the practical realities of present day in-

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Ross days, those requirements would seem even less applicable today when the United States cannot decide by itself what kind of a court to establish abroad but must negotiate with other sovereign governments the terms on which military bases may be established and who will be responsible for maintaining discipline, law and order among the Americans who enter the country in connection with those bases.

ternational relations, the only possible trials under United States law are military trials. The practical necessities and the unavailability of alternatives, which are discussed in this brief, demonstrate, we believe, the ample reasonableness of the Congressional judgment.

On the other hand, if our Constitution should be deemed to prevent the United States from taking advantage of the concession which host countries are willing to make, and have made, to military authority in view of the military responsibility for the whole visiting unit, the United States to that degree would have tied its own hands in making joint military arrangements with other nations. The historical evidence shows, we suggest, that the framers of the Constitution were too well aware that unforeseen contingencies might arise in the defense of the United States to hobble with such restrictions the army of the Republic, which they made subject to full control by the national legislature.

2. Article 2 (11) of the Uniform Code may also be sustained under Article I, section 8, clause 14, of the Constitution, conferring upon Congress the power to make rules for the government of the land and naval forces. The historical evidence discussed below shows that this power, like other enumerated powers, is subject to the necessary and proper clause and was considered broad and flexible to meet changing circumstances. The power to subject civilians closely related to the armed forces to court-martial jurisdiction is not a radical change from concepts with which the

framers of the Constitution were familiar. It is conceded, in fact, that the power to make rules for the government and regulation of the land and naval forces includes the power to subject civilians to court-martial jurisdiction under certain circumstances. The question is whether that power should be measured by the circumstances of the eighteenth century or of the twentieth century. Our answer is that the extent of the admitted constitutional power to make some civilians subject to court-martial jurisdiction must be judged by what is necessary and proper under the conditions of today.

In our view, civilians accompanying the armed forces overseas are now as much, if not more, an integral part of the land and naval forces as were camp followers and sutlers in the field at the time the Constitution was adopted. The practical considerations discussed in this brief demonstrate the extent to which the entire visiting contingent is in fact one unit for which the military commander is responsible abroad. And if the military commander has the responsibility—to the foreign country, to the United States, and to the individuals within his command—he must have the general power of supervision which is a concomitant of responsibility. To be effective this power of control must be exercised promptly and locally, and neither trial by the courts of the foreign state nor trial in the United States will solve the problem of military responsibility divorced from authority.

In short, it is our position that in terms of twentieth century defense needs, where large contingents

must be stationed abroad for extended periods of time, civilians accompanying the armed forces are an integral and necessary part of the armed forces overseas for whom the military commander in the area is responsible; and that they are therefore properly subject to the rules for the government of the land and naval forces.

SUMMARY OF ARGUMENT

I

A. The practical necessity for court-martial jurisdiction over civilians accompanying the armed forces into territory over which the United States is not sovereign may be simply stated. The whole visiting contingent—soldiers, sailors, airmen, civilians, and dependents—is in the eyes of the host state and in terms of the military needs of the United States one unit, for the conduct of which the military commander, who represents the effective power of the United States in the area, is responsible. This is recognized in the NATO Status of Forces Agreement, where the United States has by treaty assumed the obligation to take necessary measures to assure that its whole contingent conforms to certain standards of conduct. The military authorities must therefore have power of control over the whole unit concomitant with their responsibility for the whole unit.

The Congressional judgment reflected in Article 2 (11), that control over the entire visiting contingent is necessary, is supported by the actual experience in the field. Defense Department solicitation of the

views of commanders in overseas areas has elicited the unfailing response that ability to perform the assigned mission would be seriously impaired if jurisdiction over accompanying civilians is lost. The terms under which accompanying civilians are allowed to enter the host state, the conditions under which they live—sometimes in a virtual enclave—the necessity for providing for their health and welfare, all serve to interweave their activities with those of the military. The responsibility which overseas commanders must assume under these conditions cannot be divorced from power to supervise and control the whole group.

B. Effective control over civilian members of the visiting unit cannot be exercised without criminal jurisdiction. Overseas commanders meet the heavy responsibilities imposed upon them by promulgation of orders, regulations, and other directives applicable to the personnel of their commands, military and civilian. The power to enforce these directives promptly and locally by punishment, when necessary, is essential. If civilians may disobey directives without being subject to the punishment which could be imposed on the soldier in the same house, or at the next desk, manifest injustice would result.

All kinds of violations by the civilian part of our military contingents overseas, whether they result in the murder of a soldier, the neglect of security regulations, the introduction of narcotics, or black-marketeering, can affect the defense needs of the United States and the acceptability of our military contingents as visitors in a foreign land. It is a basic prem-

ise of our law that power to impose fines and imprisonment is the most effective means of deterring infractions. The overseas commanders need to have that power available promptly and on the spot, if they are to carry out their duties.

C. Assuming that alternatives to court-martial jurisdiction were legally and politically available,[1] they would not provide the prompt and effective supervision which the practical necessities require.

A commander responsible for the whole unit should not be expected to rely upon foreign authority and foreign courts to carry out the responsibility which the host country has indicated to be that of the United States, and which the United States has assumed. Where injuries are to United States nationals by United States nationals, foreign authorities could not be expected to be as interested in prosecution as our own officials. Moreover, trial in a foreign court would not solve the problem of violations of law and military regulations which are not offenses under the law of the foreign state. In particular, security violations would not be subject to foreign trial. The commander's responsibility for the security of his base requires the imposition of discipline under United States law.

Trial in the United States, if it were possible, is no adequate solution to the problem of responsibility. For many crimes, particularly those relating to military regulations, only prompt and local punishment

[1] The legal and political availability of such alternatives is discussed in Point II, *infra*.

would be effective. The difficulties inherent in a delayed trial in a distant place make it almost inevitable that only the most gross infractions would be punished, and even as to such cases, there is no assurance that distant prosecution would be possible.

The real alternative to court-martial jurisdiction would probably have to be to prohibit dependents and civilian employees from accompanying the armed forces overseas. This would have a serious adverse effect on our ability to meet our defense needs.

D. Since the whole contingent is one unit for which the military commander is responsible, there is no valid distinction, for purposes of court-martial jurisdiction, between civilians employed by the armed forces and civilian dependents.

The sum of our discussion is that the decision whether civilians overseas are a necessary part of our armed forces, and whether practical necessity requires that they be subject to military authority, is primarily one for the executive and legislative branches of the government. Their combined judgment is reasonable and is clearly not so without rational basis that this Court should overrule it.

II

Any discussion of the alternatives that might be available to court-martial jurisdiction of civilians accompanying the forces overseas starts with the fact that for most offenses there are *no* alternatives except by the consent of the foreign government concerned. Consideration of what might be available thus amounts

to an attempt at prognostication in the field of foreign affairs. On the basis of existing treaties, particularly the NATO Status of Forces Agreement, and present attitudes of foreign governments, our guesses as to available alternatives are as follows:

A. As to offenses over which the receiving (or host) state has concurrent jurisdiction, the only alternative to court-martial jurisdiction over American civilians overseas which can reasonably be anticipated is trial by the foreign state under its laws and in its courts. The receiving state has not relinquished its jurisdiction over such offenses. It has merely recognized a primary right in the United States to exercise jurisdiction in certain categories of cases.

The cession has thus far been made only to military authorities in recognition of the fact that the civilian contingent is in a practical sense part of the whole visiting military unit. It is doubtful that cession would be made to any other type of United States jurisdiction. There is a historical tradition in many countries that the country of a visiting force is permitted to exercise jurisdiction over its troops under its own law. It is therefore not a radical departure to cede to military authorities jurisdiction over the civilian components of the same armed force. To grant any other form of adjudicatory power would, on the other hand, be either a serious break with tradition or a return to outmoded concepts of extraterritoriality. For instance, the alternative of a civilian trial by the United States in the foreign

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country is not feasible. Any request for such jurisdiction could not avoid the implication that a fair trial would not be available in the courts of the receiving state. It would too closely resemble the former, outmoded, unilaterally imposed, capitulations to be readily acceptable.

It would also probably be impolitic for the United States to seek, and it is doubtful that the host country would grant, the right to try in the United States a crime committed in the territory of the host state which is a crime under the law of that state. The United States for itself has insisted that trials by visiting forces of persons subject to their jurisdiction for crimes committed here shall be in the United States. Moreover, even should some governments agree that a military dependent could be removed, the alternative of a civilian trial in the United States is not readily available. Unless they are violations of the Uniform Code, such crimes as murder committed in a foreign country are not now crimes punishable by the United States. There would be substantial problems in adopting American legislation which would cover the foreign conduct necessary to be covered in order to maintain order and discipline on military bases abroad, but which would not go too far.

This type of offense against both laws, for which only foreign trial would be the likely alternative, covers a very substantial portion of the crimes for which, under Article 2 (11), civilians accompanying the armed forces may be tried by court-martial. Many offenses which might seem to involve only

United States military regulations, such as black-marketeering, may also involve violations of local laws, such as those relating to customs and taxes. There would inevitably be many cases of insistence upon local foreign trial if the United States military authorities were powerless to try civilians.

Here again, Congress was entitled to make the judgment, which seems to reflect the views of the American public generally, that American civilians accompanying the armed forces overseas ought, if possible, to be tried under the only American law available—American military law—rather than foreign law. It is not a reflection on the standards of other countries to recognize that unfamiliarity with foreign procedures, and the frequent necessity of acting through interpreters, would result in hardship. Also, in many countries, the protection against self-incrimination, the right to cross-examine, and other safeguards, are not the same as in the United States. Civilians who go overseas as part of the military contingent overseas can reasonably and properly expect to have the benefit of as much United States law as do the military.

B. As to offenses which are not crimes under the law of the foreign state, but which are crimes only under United States military law, the alternative to court-martial jurisdiction is, in all probability, no trial at all. Since they are not offenses under the law of the receiving state, they are not triable by the receiving state. Most of these offenses, such as violations of regulations, are not now offenses under the general criminal laws of the United States.

This type of violation must be dealt with effectively and on the spot. The only alternative to trial by court-martial that could be at all effective would be to make the offense a civilian crime under United States law and provide some United States tribunal to try it in the foreign country. However, as suggested above, present day national feelings do not allow a regular system of civilian courts to try American civilians in foreign territory (even for crimes against United States law alone) to be considered a reasonably foreseeable alternative.

C. There is one, special, limited group of offenses, not involved in the cases now before the Court, where civilian trial in the United States can be said to be possible at the present time, *i. e.* extraterritorial offenses against the government of the United States under the doctrine of *United States* v. *Bowman*, 260 U. S. 94. We may assume that for very serious extraterritorial offenses, such as treason, civilian trial in the United States, now available, would be used. But thus far, the only cases of such crimes against the United States which have been tried by court-martial are comparatively minor cases of fraud and bribery. The necessity, from the standpoint of command, of the power to deal promptly and on the spot with such infractions, the disadvantages both to prosecution and defense of trial in a distant place, and the possibility of escaping punishment where extradition is not available, all make civilian trial in the United States an impractical alternative, even for this type of crime.

III

A. Article I, section 8, clause 14, of the Constitution, empowering the Congress to make rules for the government of the land and naval forces, is properly read in conjunction with the necessary and proper clause to constitute a broad grant susceptible of expansion under changing circumstances. Although the framers had a background of hostility by the people to the army of the King, they made a deliberate decision to deal with the problem, not by the kind of limitations which had been sought from the King, but by placing the army under Congressional control, subject to the will of the elected representatives of the people. Hamilton in *The Federalist* explained that the powers to raise an army and prescribe rules for the land and naval forces "ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."

It was therefore clearly contemplated that the power to make rules for the government of the land and naval forces would be subject to expansion and development under the necessary and proper clause. Clause 14 was not tied to a confined and rigid compass. For instance, if the power to make rules for the government of the "land and naval forces" were a term of fixed content, incapable of expansion beyond the precise jurisdiction known to the framers, there would be no power in Congress to provide rules for the government of the air force. The power to provide com-

martial jurisdiction of civilian contingents accompanying the armed forces into foreign territory, under present-day conditions, is not different in character.

B. Article 2 (11) represents an adaptation, to twentieth century realities, of concepts known to the framers. Some civilians were already, at the time of the Constitution, known to be subject to court-martial jurisdiction. Civilians accompanying the armed forces into foreign territory are, for all the reasons previously discussed, as integral a part of our forces overseas as were sutlers and retainers to the camp who were subject to military jurisdiction within the United States at the time the Constitution was adopted.

Certainly, there is nothing in the history of Article I, section 8, clause 14, which would bar Congress from using courts-martial as the legislative tribunals available to implement the right, which the United States obtains from a foreign country, to try under United States law civilians committing offenses which are violations of the law of the foreign state.

IV

The constitutional distinction between major crimes and petty offenses is not a relevant distinction for purposes of court-martial jurisdiction over civilians in foreign territory.

A. Petty offenses, in the constitutional sense, are those offenses which are deemed exempt from the guaranty of a jury trial in Article III and the Sixth Amendment. While the standards applicable to a

petty offense for constitutional purposes are not clearly defined in the decisions, this Court has indicated that both the nature of the offense and the maximum permissible punishment must be considered. For example, the crime of reckless driving, subject to a fine of $100 and imprisonment of not more than 30 days, was held not to constitute a petty offense because of the degree of moral wrong involved. *District of Columbia* v. *Colts*, 282 U. S. 63. In general, petty offenses for constitutional purposes are infringements of local police-type regulations, the moral quality of which is comparatively inoffensive, and for which a relatively minor penalty can be imposed. The penalty actually imposed is not determinative.

While the classification of petty offenses serves as an exemption from the guaranty of a jury trial, it is by no means clear that the same exemption can be read into the provision of Article III for judges having lifetime tenure. Thus far, Congress has made petty offenses triable before non-Article III judges or courts only in areas where it has been held, or where it is arguable, that courts or judges not deriving their power from Article III may constitutionally sit, as in the territories or the District of Columbia. The distinction between petty offenses and major crimes cannot be safely utilized as marking the dividing line between Article III and non-Article III power.

The distinction between major crimes and petty offenses therefore has meaning where Article III applies, or where Article III judicial power does not apply but the Sixth Amendment does (as in the Dis-

trict of Columbia and the territories), only as marking the line of offenses for which there need not be trial by jury. Where neither Article III nor the Fifth and Sixth Amendments are otherwise applicable, the distinction has no significance.

B. We think the classification has no significance to court-martial jurisdiction of civilians accompanying the armed forces overseas because neither Article III nor the specific guaranties (other than due process) of the Fifth and Sixth Amendments apply to trial of offenses by such civilians abroad.

Admittedly, these guaranties do not apply if, as we think we have demonstrated, court-martial jurisdiction is properly conferred here under the Congressional power to make rules for the government of the land and naval forces.

They also do not apply, under the decisions of this Court, to any trials of United States nationals in foreign countries, whatever the source of the tribunals established for such trials. *In re Ross*, 140 U. S. 453. To render the distinction between major and petty offenses meaningful in relation to that problem, the Court would first have to hold; contrary to its prior decisions, that, while legislative tribunals may be used abroad to try civilians for crimes committed abroad, such legislative tribunals are bound by the Fifth and Sixth Amendments as in the District of Columbia. So to hold would represent a radical and unwarranted departure from prior rulings.

As to offenses which are crimes under the law of the country where committed, the basic rationale of *In re Ross* is as valid today as it was at the time of that ruling.

Article III and the Fifth and Sixth Amendments do not apply because the United States has no automatic right to try its nationals for such crimes, but only such right as is conferred by the state having territorial jurisdiction. The real choice is not between a United States trial under the Sixth Amendment and a United States military court; the choice is between trial by United States legislative tribunal (such as a court-martial) under United States law and trial by a foreign court under foreign law.

Even as to crimes which are offenses under United States law alone, this Court has held that trials outside the limits of the continental United States, in our insular possessions, are not subject to the Fifth and Sixth Amendments because the special conditions of those territories rendered those guaranties inapplicable and impractical. For the reasons developed in Point II, *supra*, a system of American courts in foreign countries which could operate within the limitations of those Constitutional amendments is even less feasible.

Nor would it solve the problems arising from the presence of civilian components overseas to have petty offenses triable on the spot by court-martial, and then have all other offenses triable in this country in the courts of the United States. It is questionable whether any country would consent to such a distinction as to major crimes which are crimes under its laws. From the point of view of the United States, it would take radical changes in existing laws to make the concept of petty offenses applicable to military law, and until new legislation was passed, not only would

our present treaties be ineffective, but new negotiations could not be conducted on any firm basis. Other objections to trials in this country are discussed in Point II, *supra*.

Beyond these difficulties, no limitation of court-martial jurisdiction to petty offenses would solve the practical problems of responsibility divorced from authority. From the point of view of the civilian contingent abroad, such a distinction would put a premium on the commission of major rather than minor crimes, in the hope that removal to the United States and trial here would prove to be too burdensome. Congress could reasonably and properly conclude, as it did in Article 2 (11), that all offenses by the civilians should be subject to one law and tried on the spot.

ARGUMENT

In the four Points which follow, we discuss the questions which the Court asked in its order of November 5, 1956, 352 U. S. 901.[1] The first question

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[1] The order provided as follows:

"The petition for rehearing is granted. On reargument counsel are invited to include among the issues to be discussed by them the following matters:

"1. The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas; the practical alternatives to the exercise of jurisdiction by court-martial.

"2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court martial jurisdiction [illegible] Art. I, § 8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the

is treated both in Point I and in Point II. Point III discusses the second question. The discussion of the third question is included in Point I. The fourth question is dealt with in Point IV. We have attempted not to repeat *in extenso* the arguments or materials set forth in the briefs and memoranda we have already filed in these cases, and for that reason we feel warranted in suggesting to the Court that this brief does not stand alone but should be considered together with the prior arguments we have submitted.

I. COURT-MARTIAL JURISDICTION OVER DEPENDENTS AND CIVILIAN EMPLOYEES ACCOMPANYING THE ARMED FORCES OVERSEAS IS A PRACTICAL NECESSITY BOTH AS A MATTER OF INTERNATIONAL RELATIONS AND TO ACCOMPLISH THE MILITARY MISSION

The Court has invited discussion of "The specific practical necessities in the government and regulation,

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conclusion that the Art. I, § 8, cl. 14, power was thought to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

"3. The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents.

"4. The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses.

"Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Clark would deny the petition for rehearing. They believe that the problems presented in the above questions, with the exception of No. 4, the answer to which in their opinion is obvious, have been fully presented in the briefs and argument already had. Mr. Justice Brennan took no part in the consideration or decision of this application and order."

of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas * * *." Such discussion bears on both constitutional bases for supporting the validity of Article 2 (11) of the Uniform Code of Military Justice. On the issue of whether a court-martial is an appropriate legislative tribunal to exercise jurisdiction relinquished by a foreign government, this material demonstrates the reasonableness and wisdom of the congressional action. When considering Article 2 (11) as an exercise of congressional power to make rules for the government and regulation of the land and naval forces, and to make laws necessary and proper in the execution of that power, the practical problems demonstrate the necessity and propriety of the legislation adopted.

A. CIVILIANS ACCOMPANYING THE ARMED FORCES OVERSEAS ARE PART OF A SINGLE CONTINGENT FOR WHICH THE MILITARY COMMANDER IS RESPONSIBLE BOTH TO THE FOREIGN GOVERNMENT AND TO THE UNITED STATES AND OVER WHICH HE MUST HAVE EFFECTIVE CONTROL

The prime practical necessity may be summarily stated. A commander who has responsibilities must be armed with authority to discharge those responsibilities. Civilians accompanying an armed contingent overseas are, in their status in relation to the host country, part of one unified contingent, allowed to be on foreign soil because of the military commitments of the United States in relation to the host country. The commander, who represents the effective power of the United States in the foreign territory, thus has a responsibility in relation to those civilians that he does not have in relation to civilians accompanying the

armed forces in United States territory. In foreign territory, it is the whole contingent which is the representative of the United States, not merely the military part of the group.

Since World War II, the troubled international situation has made it necessary for the United States to deploy its armed forces throughout the world for the protection of our nation and the free world. These forces include a large civilian contingent of dependents and employees, as well as the actual members of our armed forces. This civilian contingent is almost equal in size to the military contingent.[5] Latest Department of Defense figures show that 348,298 civilian dependents[6] and 23,272 American citizen-employees are now[7] stationed in foreign areas where they are subject to military law under Article 2. (11), Uniform Code of Military Justice. More than two-thirds of these civilians are accompanying the Army and the balance accompany the Navy and Air Force.

All these civilians are in foreign countries because the United States needs them there for military

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[5] As of September 30, 1956, there were 745,858 members of the armed forces outside the continental limits of the United States of whom over 500,000 were stationed in foreign countries. In addition there are some 388,000 naval personnel "afloat" some of whom are on ships operating out of foreign ports.

[6] As of January 31, 1956. The Department of Defense breaks this figure down into 330,851 who are dependents of military personnel and 17,447 who are dependents of civilian employees. In this brief, no distinction is made as between the two, the phrases "military dependents" and "civilian dependents" being used for the entire group.

[7] As of September 30, 1956.

reasons. It is a basic postulate that there is a military necessity for our having bases overseas. It is also a basic postulate that the armed forces must have available at such bases the services of civilian technicians and that to maintain morale and recruitment military personnel must be allowed to have their families with them.

The United States is as much responsible to the host country for these civilians as it is for the military contingent. For example, the United States has by treaty agreed to take whatever measures may be necessary to see to it that military dependents who accompany the armed forces into a foreign country live up to certain standards. Article II of the NATO Status of Forces Agreement (Reply Br. 33) sets standards of conduct which are expressly made applicable not only to the forces but to the civilian component and to dependents: they are to respect the law of the receiving state, to abstain from activity inconsistent with the spirit of the NATO Agreement, and to abstain from any political activity in the receiving state. The article provides that it is the duty of the sending state, the United States, to take necessary measures to that end. That there is a practical responsibility as well as a legal one is clear from the type of activities mentioned. Certainly, there would be few countries in which we would long have troops stationed should American civilians accompanying them engage in local political activities.

Immediately responsible for the welfare of these civilians and also responsible for them in the eyes of

the host state is the American commander in the area. In view of the desire for factual information evidenced by the Court's question, the Department of Defense solicited from overseas commanders their views concerning the necessity for court-martial jurisdiction. Without exception, these commanders state that discipline would be disrupted, morale impaired, and ability to perform the assigned mission reduced if jurisdiction under Article 2 (11) is lost. Some of the replies are printed as Appendix A to this brief (pp. 97-129, *infra*). The basic theme running through all the replies is that responsibility cannot be divorced from effective power to control. The very willingness of foreign governments to allow United States troops within their territory may depend upon the ability of the military commander to maintain order and discipline over these civilians within his command. To hold that the United States did not have the constitutional power to give its military commanders authority over military dependents and employees overseas would make some foreign governments less willing to accept United States contingents in their territory and to this extent would weaken the military defense of the United States and the free world.

It has been argued, however, that civilian dependents are no more a part of the military in overseas areas than they are in this country. This is not true. All civilians who accompany the armed forces overseas are so closely identified with those forces as to be indistinguishable from them for all practical pur-

poses. In addition to being transported overseas at government expense, such civilians are supplied passports which identify them as employees of the armed forces or as dependents. They are admitted to the country in which they live without a visa because the particular armed force vouches for their behavior. They use military payment certificates, the armed forces' medium of exchange, and they have the benefits of the special armed services postal facilities, which are not available to Americans traveling abroad as tourists or on business. The benefits of this postal system include reduced overseas postal rates, special customs privileges, and availability of money order and other services of the Post Office Department. Accompanying civilians enjoy the same tax exemptions, customs benefits, and border crossing privileges as the uniformed members of the services. Both are permitted to import automobiles without tax in many countries where importation is strictly forbidden to others. Accompanying civilians receive medical and dental treatment at armed forces' hospitals and dispensaries, and in event of death mortuary services are provided. Schools are maintained at government expense for all children of the military community without regard to whether their parents are soldiers or civilians. Churches, theaters, clubs, tours, and sporting and cultural events are shared by civilian and military members of the military communities overseas. Members of the civilian contingent are housed by the military. They are furnished heat, light, fuel, water, telephone and other services. They ride in military

transportation, and their food, clothing and other necessities are available from sources maintained by the armed services. Special banking facilities, provided for the services, are utilized by these civilians, who also share with the military the protection of the military police. In many areas the forces make gasoline, oil, and parts available for private automobiles, and maintain service stations and garages. Also, in many areas they issue automobile license plates and drivers' licenses to military and civilian members of the community; and supervise the issuance and administration of automobile insurance for them.

These, as well as other factors, closely identify these civilians overseas with the armed forces. In every essential of their daily living their activities are interwoven with those of the military. Because they are so closely identified with the armed forces, the local populace in the various foreign areas look upon and identify these civilians only as members of the American military community. In most foreign countries, military personnel wear civilian clothes off the base. To the local population civilians and military are indistinguishable. As a corollary, the local populace naturally—and rightly—expects the military commander to supervise and control this civilian contingent. Without the power of disciplinary action over these civilians, the commanders' efforts to maintain the smooth community relationships necessary to successful fulfillment of his mission in a foreign land would be seriously impaired.

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Our overseas commanders have the basic, primary responsibility of maintaining the armed forces in a state of combat readiness to meet any eventuality. They have the further responsibilities of serving as good-will ambassadors and of operating their military communities in such a way as to give the best possible impression of the United States to people in foreign areas. Incident to these basic responsibilities are the underlying responsibilities of providing for the security, health, welfare, schooling, religious activities, and physical safety of all of the members of the military community. To discharge these responsibilities the commander must have some control over the activities of his charges. He must be able to prevent and deter activities which would jeopardize the security and effectiveness of his command and he must be able to protect his personnel from one another.

B. EFFECTIVE CONTROL OVER CIVILIAN MEMBERS OF AN OVERSEAS MILITARY CONTINGENT CANNOT BE EXERCISED WITHOUT CRIMINAL JURISDICTION

In large part, commanders meet the heavy responsibilities outlined above by promulgation of orders, regulations, and other directives applicable to the personnel of their commands, and covering various phases of the daily activities of military and civilian personnel alike. Of course, if the commander has no jurisdiction over the civilians, he has no effective means of enforcing his directives in so far as they are concerned. In such a situation, a man or woman in civilian clothes could violate the commander's direc-

tives with impunity, whereas a man or woman in uniform could expect to be punished for a similar violation. For example, in connection with controlling narcotics, a commander promulgates a directive forbidding possession of hypodermic needles by nonmedical personnel. The directive could be effectively enforced against a serviceman's violation by court-martial, if appropriate, but if this serviceman's wife were not subject to military jurisdiction it could not now be enforced against her. Even more important are the security regulations which commanders promulgate. If there is no power to enforce such regulations as to the civilian contingent, the commander's orders become almost meaningless and the very security of the command may be impaired or undermined.

We have already set forth, at pages 3–12 of our reply brief, various examples of the types of matters over which a commander must assume responsibility, and we do not undertake to repeat those instances here. The fact is that all kinds of violations by the civilian part of our military contingent—whether the murder of a soldier as in these cases, or the introduction of narcotics, or black-marketeering, or neglect of safety regulations—necessarily affect the military portion of the contingent and the group as a whole and necessarily reflect on the status of our contingent as visitors in a foreign land. It would be unfair to permit a civilian to violate the commander's directives concerning security, black-market activities, illegal money conversions, postal operations, banking, ownership and operation of automobiles, entering off-limits

areas, etc., with impunity, while the soldier working at the next desk or living across the hall is tried by court-martial for participating with the civilian in the very same offense. Such a situation is contrary to one of the cardinal principles of maintaining discipline in a military community—or any other community—the fair, just, and equal treatment of all its members. Without doubt, the loss of military control over the civilian contingent would adversely affect the commander's ability to maintain a combat-ready force by destroying morale, undermining discipline, and disrupting the orderly processes of the command.

It is also, of course, a basic premise of our law that power to impose fines and imprisonment is the most effective means of deterring infractions of law. The fact that there have been comparatively few major offenses by civilians accompanying the forces overseas does not prove that court-martial jurisdiction is unnecessary. Army records show that during the last seven fiscal years the Army has tried by general court-martial 181 of these civilians and that 2,273 of them have been tried by either special or summary court-martial. In addition, other forms of action have been taken in cases of many such civilians as a result of activities not warranting trial by court-martial. In view of these figures, it is plain that some form of criminal jurisdiction must be exercised over them.

An idea of the importance of the exercise of punitive jurisdiction in relation to civilians overseas may

be gleaned from an analysis of the offenses tried. This break-down is currently available only for the Army and only for cases tried by general court-martial, not for the 2,273 lesser offenses which were tried by inferior courts-martial and which include violations of many of the types of regulations discussed above.[8] Nevertheless, the figures as to the more serious offenses show the various types of problems with which a command overseas is called upon to deal. The nature of the offenses points up the necessity for having available promptly, and on the spot, a tribunal capable of dealing with such violations. The figures are as follows:

ARMY TRIALS BY GENERAL COURT-MARTIAL OF OFFENSES BY CIVILIANS, 1950–1956[1]

Larceny	36
Failure to obey orders and regulations	35
Narcotics	29
Procurement (bribery, sale of government property)	19
Frauds against government	15
Murder	13
Sex offenses	10
Manslaughter	9
Robbery	6
Forgery	5
Other homicide	3
Assault	2
Other	62
Total	244

[1] These represent the number of offenses rather than the number of persons which was 181.

Administrative remedies are obviously not adequate to deal with offenses of this kind. They are also inadequate to deal with the many lesser offenses such as currency violations, disobedience to orders, and

[8] Data is available as to all trials of civilians in Iceland and is given in Appendix B, pp. 130–131, *infra*. Violations of regulations as to currency and liquor were the most frequent.

violations of base regulations. To deprive an employee of commissary privileges might either be ineffective as punishment, as in Paris where other supplies are available, or out of the question, as on a Greenland air base where no other food is available except that provided by the United States. Sending an employee back to the United States deprives the government of the services of a man who would not be there unless his services were required, and may in many cases be no deterrent at all. Sending a dependent back to the United States enforces that separation which the program of having dependents overseas is designed to avoid, and may also, in many instances, have no deterrent effect. In either case the "remedy" is costly and injurious to the accomplishment of the military mission.

It may properly be assumed, we suggest, that cases which can adequately be handled by administrative disposition are now being handled in that way, since this is easier than conducting a court-martial. The fact that in over 2,000 cases the commanding officer has found that a court-martial was required to consider and, if need be, punish civilians under his command demonstrates that those responsible for the success of our military missions overseas cannot maintain effective control without criminal jurisdiction.

C. ASSUMING THAT JUDICIAL ALTERNATIVES TO COURT-MARTIAL JURISDICTION WERE LEGALLY AND POLITICALLY AVAILABLE, THEY WOULD NOT PROVIDE THE PROMPT AND EFFECTIVE CONTROL REQUIRED

We discuss below in its legal aspects the Court's question as to the possible alternatives to trial by court-martial, and show that, with rare exceptions, as

to violations of military regulations there is probably no alternative at all, and as to general crimes, no real alternative except trial by the foreign state. Point II, *infra*, pp. 40–63. It is important here, on the question of practical necessity, to point out that no alternative that could be suggested would meet the problem of responsibility divorced from authority.

Even where foreign trial is a possibility, a commander must go to foreign authority to carry out the responsibility which the host country has indicated, and the United States has implicitly or by treaty agreed, should be his. If the suspect is an American civilian, and the victim is another American or our government, the foreign nation could not be expected to be as interested in prosecution as our own officials. In some cases, again consider a Greenland airbase, local officials may not be available regardless of their interest. If the foreign governments were to try our civilians, they would, of course, have to receive full cooperation with respect to any necessary investigations. Normally, some evidence relating to almost any offense is to be found within the military installation. This would mean that local police would have to be admitted to areas which are sensitive from a security standpoint. As a matter of fact, if jurisdiction over the civilians is wholly lost, it seems probable that policing of our installations would also pass to the foreign country. Thus, security precautions would have to be greatly increased, and it is unlikely that they could be made completely effective in such circumstances.

Many other problems would arise upon conviction and sentence by the foreign court. The commander could not supervise the conditions of imprisonment. There would be problems as to what action he could take with respect to prisoners in the event of an emergency, or even in the situation when the sponsor is transferred to another part of the world, leaving the wife, son, or daughter in a foreign jail. These and many other problems would flow from making our civilian contingent overseas subject to trial only in foreign courts. Such a result would adversely affect the morale and discipline of both the military and civilian contingent of our armed forces overseas. It would also seriously handicap the armed forces in securing the necessary civilians for overseas employment and in maintaining a professional corps of officers and men.

Moreover, trial in a foreign court would not solve the problem of violations of military regulations which are not offenses under the law of the foreign state. In particular, one class of offenses of greatest importance to overseas commanders and to this country would not be violations of the local law, namely security violations. Violations of commanders' directives would not be punishable under the foreign law, and many such directives necessarily relate to matters affecting security. Omitting consideration of major offenses, such as treason (see *infra*, pp. 61–63), infractions in themselves minor can seriously affect

security, and should be dealt with promptly. Also significant to some overseas commanders, particularly in the Far East, is the traffic in drugs, which must be strictly dealt with by command directives because they are not offenses under the law of the host state. See *United States* v. *Burney*, 6 USCMA 776, printed as an Appendix to our main brief in No. 713. In such cases, the United States commander's responsibility for his base requires the imposition of discipline under the United States law.

Trial in the United States, if it were legally and politically available (as to which see *infra*, pp. 40–63), is no adequate solution to the problem of responsibility. For many crimes, particularly those relating to military regulations, only prompt and local punishment would be effective. As a practical matter, civilians could still with impunity violate the directives by which the commander controls his command because all but the most flagrant cases would not be prosecuted by removal to this country. Prosecutions would often fail for lack of power to subpoena foreign witnesses. Necessity for return of American witnesses to the United States would undermine the efficiency of the armed forces overseas. In addition, persons accused would be at a disadvantage and delay would be inevitable. Discipline and morale would be disrupted by having one system of justice for the military and another for the civilian contingent. Such divided jurisdiction would, of course, make prosecution of joint offenses involving both military

and civilian personnel, unwieldy, ineffective and inefficient, and in many cases impossible.[9]

The real alternative to lack of court-martial jurisdiction over civilians would probably have to be to prohibit dependents and employees from accompanying the armed forces overseas.[10] Such action would have a direct, immediate, and palpable adverse effect on recruitment, morale, discipline, and efficiency of the forces. Congress has recognized the necessity for service families to accompany their service members overseas, and the presence of dependents there has proven to be a great morale factor. If dependents should in the future be precluded from accompanying their service sponsor overseas, the now difficult task of maintaining a peacetime professional corps of officers and men would be made even more so. Few men who are either married or expect some time to be married would choose the armed forces as a career if that choice meant frequent and long periods of separation from their families.[11] On the other

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[9] As discussed below, we do not regard trial by an American civilian court sitting in a foreign country as a possibility that can be achieved at this time. But even if it were possible, the issue of divided authority in a foreign area, where the commander is responsible for the whole unit, would remain.

[10] We have considered and rejected the thought that all adult dependents might be required as a condition of going overseas to enlist in some form of military auxiliary service which would be a part of the armed forces.

[11] A decision to allow no dependents overseas might lessen the willingness of some countries to have United States troops stationed within their territory. At the present time, the large dollar expenditures made locally by the American contingent is one factor weighing in its favor.

hand, as the matter now stands, the prospect of foreign travel as a family is sometimes a strong inducement to a service career. With respect to civilian employees, if the armed forces are precluded from employing skilled civilian technicians for overseas service, the only solution would appear to be widespread application of draft laws similar to the controversial "Doctors Draft Act" (50 U.S.C. App. 454 (i)). Otherwise, the armed forces could not function overseas, or in fact on the high seas since civilian technicians are an integral part of a larger ship's complement.

D. FOR PURPOSES OF COURT-MARTIAL JURISDICTION, THERE IS NO VALID DISTINCTION BETWEEN CIVILIANS EMPLOYED BY THE ARMED FORCES AND CIVILIAN DEPENDENTS

The previous discussion answers, we think, the third question asked by the Court, *i. e.*, "The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents." For purposes of court-martial jurisdiction over civilians overseas in time of peace, no valid distinction can be drawn between civilians employed by the armed forces and civilian dependents. Indeed, except with respect to the strictly military offenses, no valid distinction can be drawn between soldiers, civilian employees, and dependents. The basic problem is one of control over a mixed community of civilian and military personnel who together represent the visiting American contingent, invited into the territory of a friendly foreign power

in response to the military needs of both countries. As we have pointed out, in the eyes of the host state, it is the whole contingent which is the visiting force. In the eyes of the United States, it is the whole contingent which is carrying out American policies. The responsibility is for the whole contingent. It makes no difference how the individual spends his days, nor is it important the kind of clothing he wears, be it a uniform or civilian suit.

One example may serve to illustrate this point. Take the case of a woman specialist serving overseas as a member of the Women's Army Corps. There can be no doubt that in this status she is subject to the Uniform Code of Military Justice. At the end of her voluntary term of service in the Army she elects to be discharged overseas and accept a job as a civilian employee. The chances are that the civilian job is the identical job she performed as a uniformed member of the military community. The only differences would be that she would not be required to wear a uniform while on duty, and if her status in the WAC had been that of an enlisted person she would probably move from her barracks to a civilian employees' billet. She would also be issued a passport identifying her as a civilian employee of the Department of the Army accompanying the Army overseas. None of these changes seems so drastic as to require that she be exempted from the entire code of laws which governed her conduct before she changed her clothing and received her passport.

To carry the illustration one step further, assume that our hypothetical young woman next marries a

uniformed member of the Army, but continues to work at her job as a civilian employee. At this point she occupies a dual status, and if civilian employees are subject to the Uniform Code of Military Justice, whereas dependents are not, her status becomes confused. It is not important to speculate as to which status would be controlling in these circumstances because, by the simple act of resigning her job, she could throw off any possible amenability to that Code. The final step is, of course, her resignation from the job to work full time at being a dependent. As such, she may not be able to have access to some materials and may not be in a position to violate some regulations which would apply only to workers. But she would still be living on the base, in constant contact with members of the armed forces, capable in many ways of affecting security, health, and welfare of the contingent. In each of these possible degrees of status, she is a true part of our visiting force overseas.

In short, in the realities of the modern world, civilian dependents and employees of a visiting force are an integral and necessary part of the force for which the commander is responsible, to his own and to the host country. His responsibilities demand the power to supervise and control possible offenders. Court-martial jurisdiction over the whole civilian component is thus a necessary concomitant of the responsibility which the commander unquestionably bears.

The decision whether civilians overseas are a necessary part of our armed forces and whether prac-

tical necessity requires that they be subject to military authority is primarily one for the executive and legislative branches of our government. Their judgment is and has been that civilian employees and dependents are a necessary, or, at the very least, a highly desirable addition to our defense forces overseas. The Congressional judgment is also that effective regulation of these civilians stationed in the territory of a foreign power requires court-martial jurisdiction over them. We respectfully suggest that this combined judgment of the executive and legislative branches of the government is not so without rational basis that this Court should overrule their considered determination.

II. NO ADEQUATE ALTERNATIVES TO THE EXERCISE OF JURISDICTION BY COURT-MARTIAL ARE AVAILABLE

Starting as we must with the basic premise, recognized by the prior opinion of the Court in these cases, that "each nation has jurisdiction of the offenses committed within its own territory" (351 U. S. at p. 479), we can give no definitive answer to the question as to the practical alternatives to the exercise of court-martial jurisdiction over civilians and dependents accompanying the armed forces overseas. The answer to that question is not for the United States alone; it will depend upon what concessions the various foreign countries where our forces and their civilian components are stationed [12] are willing to make. For most

[12] The country where forces are stationed is called in the NATO Status of Forces Agreement (Reply Br. p. 32) the receiving state, and is sometimes referred to that way in this brief.

offenses there are no alternatives except by the consent of the foreign government concerned. The statements we make must therefore be deemed merely prognostications in the field of international relations—a hazardous matter at best. On the basis of existing treaties, particularly the NATO Status of Forces Agreement, the pertinent provisions of which are discussed, *infra*, pp. 42–45, and the present attitudes of foreign governments, our guesses as to the alternatives that might be available are as follows: [13]

A. AS TO OFFENSES OVER WHICH THE FOREIGN STATE HAS CONCURRENT JURISDICTION, THE ONLY ALTERNATIVE TO COURT MARTIAL JURISDICTION OVER AMERICAN CIVILIANS OVERSEAS WHICH CAN REASONABLY BE ANTICIPATED IS TRIAL BY THE FOREIGN STATE UNDER ITS LAWS AND IN ITS COURTS

The practical alternatives to trial by court-martial of civilians overseas become more clearly focused when considered in terms of the present treaties than in terms of the interim arrangements, discussed in our original brief, under which jurisdiction of the defendants in these cases was obtained. The basic problem is of course the same, but the treaties, and in particular the NATO Status of Forces Agreement, [14] point up with clarity the basic fact on which all consideration of the validity of Article 2 (11) must rest—that this is a problem of international relations, and not a problem with which the

[13] Administrative sanctions by the military commander are discussed *supra*, *pp. 31–32*. They are obviously inadequate for more serious offenses, and experience has shown that they are not even appropriate or effective for many lesser offenses.

[14] The agreement was signed in London on July 19, 1951 (T. I. A. S. 2846) and was ratified by the United States Senate on July 15, 1953 (99 Cong. Rec. 8838).

United States can deal on its own. We discuss this matter primarily in terms of the NATO Status of Forces Agreement since it covers the countries where a large part of our armed forces overseas are situated.[15] Other countries where important contingents are situated, Japan,[16] and Germany[17] follow the same basic pattern and present the same alternatives. In all, there are agreements between the United States and over forty foreign countries which have some provision dealing with criminal jurisdiction.

Paragraph 1, Article VII, of the Treaty contains the basic grant of power and describes the persons subject to the treaty provisions, as follows:

> (a) the military authorities of the sending State have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.
>
> (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

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[15] The parties to the NATO Agreement are Belgium, Canada, Denmark, France, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. Turkey and Greece did not sign the original document but acceded later. Iceland signed the agreement but did not ratify it. Iceland has entered into a bi-lateral accord with the United States. T. I. A. S. 2266, signed May 5, 1951; T. I. A. S. 2295, signed May 8, 1951.

[16] T. I. A. S. 2492, signed February 28, 1952.

[17] Convention with United States, England and France, T. I. A. S. 3425, Part Two, pp. 1496, *et seq.*, signed October 23, 1954.

Paragraph 2 of Article VII sets forth the circumstances under which the receiving or sending state will have exclusive jurisdiction to try offenses, to-wit:

> 2.—(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
>
> (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.
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> * * * * *

If an offense violates the laws of both the sending and receiving states, both states have jurisdiction.[18] The state that has the right to try the offender in the first instance is deemed to be the state having the "primary" jurisdiction and has the prior or superior right to try the offender. The rules for the determination of which state has the "primary" right to exercise jurisdiction, where the jurisdiction is concurrent, are prescribed in paragraph 3 of Article VII.[19] When there is concurrent jurisdiction, the

[18] Par. 3, Art. VII.

[19] No person is to be twice put in jeopardy within the same territory since paragraph 8 of this Article expressly provides in that respect:

"Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party

military authority of the sending state shall have primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to—

> (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> (ii) offences arising out of any act or omission done in the performance of official duty.

In the case of any other offense, the receiving state shall have primary right to exercise jurisdiction.

Not in all cases, however, will the state having the primary right proceed to bring an offender to trial since paragraph 3 (c) of Article VII makes provision for a state having primary jurisdiction to receive a request from the other state for a waiver of its right to try the offender and—

> * * * The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

If the state having the primary right to exercise jurisdiction decides not to exercise its right, the state must

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and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party."

notify the authorities of the other state as soon as is possible. When this is done, the state having the secondary right to exercise jurisdiction may prosecute.

Thus, the NATO Agreement is a specific recognition of the basic rule of international law that within its own territory a nation has the right to declare what acts shall be a crime under its law and punish violations committed within its territory by persons whatever their nationality. The receiving state, as a matter of international accommodation, has agreed in certain instances to give to the *military* authorities of the sending state the primary right to try nationals of the sending state, but the receiving state has not, even now, under the NATO treaty, given up its basic right to try foreign nationals for conduct which is a crime under the local law. If, therefore, the United States military authorities cannot, under our Constitution, exercise the jurisdiction thus conceded to them as the sending state, it remains the province of the receiving state, both under the principles of international law and the specific terms of the NATO treaty, to try the offender. Any arrangement for the exercise of United States jurisdiction other than by military authorities would have to be the subject of new negotiations between the United States and each country involved.

As stated at the outset of this Point, we cannot do more than hazard a guess as to what would be the outcome of any attempt to negotiate for the right to exercise a type of jurisdiction other than that now accorded to the United States military authorities. It can safely be said that no greater rights can be

assured. Further, there is no basis for anticipating that the United States would in fact succeed in obtaining the right to exercise any other form of judicial authority.

1. It seems unlikely, in the first place, that all the countries where dependents or employees are now living would agree that an offense which is a crime under their laws should be tried by the United States outside their territorial jurisdiction. The reason for this is their understandable desire to have assurance close at hand that justice has been done. Under Article VII of the NATO treaty the military authorities of the sending state are given the right to exercise criminal and disciplinary jurisdiction *within the receiving state*. See page 42, *supra*. As appears from the correspondence between the United States and the United Kingdom during the pre-NATO period (which was set forth in the Appendix to the government's original brief in No. 701, pp. 78–84), the consent by the United Kingdom to our exercise of jurisdiction even over members of our armed forces for trial in that country represented a "very considerable departure * * * from the traditional system and practice." The traditional British view is that members of visiting forces are completely subject to the jurisdiction of the local courts. See Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 British Year Book of International Law 186. As noted in the government's reply brief, p. 13, the United States, for itself, insisted in Section 2 of the Service Courts of Friendly Foreign Forces Act (22 U. S. C. 702) that trial by service courts of foreign countries take place

"within the United States." The same section provides that where the offense is against a member of the civilian population the trial shall not only be within the United States but "within a reasonable distance from the place where the offense is alleged to have been committed". The position heretofore taken by the United States and other countries provides no support for the conclusion that any government would relinquish jurisdiction to another state for trial abroad for conduct which is a crime under its own law and which was committed in its territory.

Even should one or more governments agree that the United States could remove military dependents such as Mrs. Covert or Mrs. Smith from its territory to the United States for trial for murder committed on its territory, the alternative of a civilian trial in the United States is not readily available. Unless it is a violation of the Uniform Code of Military Justice, murder committed in a foreign country is not now a crime punishable by the United States. As this Court said in *United States* v. *Bowman*, 260 U. S. 94, 98:

> Crime against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

There would be substantial problems in adopting federal legislation which would cover the conduct which should be covered in order to maintain order and discipline on the military bases abroad, but which would not go too far. Should the Court hold that civilian dependents overseas must be accorded the same type of American judicial process as would be given to American tourists, it would not be clear that Congress could make a killing by one a crime against the United States without making a killing by the other also a crime. But to extend the extraterritorial effect of United States criminal statutes to apply to all United States citizens abroad would raise a number of problems. Any extraterritorial effect to United States criminal laws would create a substantial risk of trials within two countries for offenses arising from the same transaction where the constitutional protection against double jeopardy would not apply, as it would not where the second trial was in the foreign country. Moreover, other nations might not readily accept a sweeping assertion by the United States of a right to try all its nationals in this country for crimes committed abroad.

Even should such hurdles be overcome in drafting and adopting legislation defining categories of conduct abroad which are to be crimes against the United States (as well as crimes against the local government), there remain the questions of the extent to which trial in the United States for a local crime committed abroad would conflict with the venue provisions of the Sixth Amendment. Removal to the

United States might also, as a factual matter, deprive the defendant of his ability to obtain witnesses in his favor. The difficulties of a distant trial are obvious.

In short, for offenses such as the killings here involved, which are crimes under the law of the local foreign government, the alternative of a civilian trial in the United States is not now available, and cannot be assured. To make it available in the future would require concessions from all foreign governments where American troops are stationed beyond those which any government has heretofore made; it would also require legislation expanding the criminal statutes of the United States to cover the globe; and it would likewise appear to raise legal and practical problems at least as difficult as those involved in Article 2 (11) of the Uniform Code of Military Justice.

2. The alternative of a *civilian* trial by the United States *in the foreign country* seems no more promising. The United States would be reluctant to ask countries to agree, as one consequence of stationing United States troops within their territory, that they allow the United States to establish a system of civilian courts to sit in their country and to try American civilians who accompany the armed forces for conduct for which they could also be tried in the local courts. Any such request could not avoid the implication that a fair trial would not be available in the courts of the receiving state. There is a historical tradition in many countries that the country of a visiting military force is permitted to exercise jurisdic-

tion over its troops under its own law. See I Oppenheim, *International Law* (Lauterpacht), 8th ed. 1955, § 445. It is therefore not a radical departure from national traditions in many countries to cede to military authorities jurisdiction over civilian components of an armed force; rather, it is a recognition of the reality of the civilian component's being an integral part of the visiting force. To grant a civilian form of adjudicatory power would, on the other hand, be a serious break with tradition and, as we develop immediately below, a return to concepts of extraterritoriality which have been outmoded. It was a recognition of this fact which led the British to pass a statute equivalent to Article 2 (1f).[29] The pertinent section is reprinted in Appendix C, *infra*, pp. 132–133.

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[29] Section 209, Army Act, 1955, 3 and 4 Eliz. 2, Ch. 18. In explaining this legislation, the Report of the Select Committee (1953–1954 session) states (pp. xxvi–xxvii):

"• • • Between World Wars I and II the United Kingdom forces overseas were largely stationed in the Colonies but in most other places where troops were located His Majesty's Government possessed 'extra-territorial rights' which enabled His Majesty's Consuls to exercise civil and criminal jurisdiction over British subjects. When these rights were gradually relinquished a need arose to negotiate special jurisdictional rights for members of the forces. This occurred in the negotiations with Iraq and Egypt which culminated in the Anglo-Iraqi and Anglo-Egyptian Treaties of Alliance of 1932 and 1936 respectively.

"The necessity to settle the position regarding jurisdictional rights again arose in relation to certain allied countries during the war, but since the war and as a result of the continued stationing of United Kingdom forces in many foreign countries the problem has become a very general one and has been dealt with in several international agreements. The N. A. T. O. Status of Forces Agreement gives certain jurisdictional rights in respect of members of Her Majesty's forces and accompanying civilians stationed

In many countries, including Turkey and Japan where large contingents of United States forces are located, unilaterally established, separate foreign courts, such as the former consular courts, carried the stigma of "capitulations."[21] Japan succeeded in releasing itself in 1899 from the limitations imposed upon its sovereignty by the exemption of aliens from its local jurisdiction.[22] Upon the outbreak of war in 1914, Turkey announced the abrogation of the capitulations, which, it asserted, restricted its sovereignty. This unilateral action was contested by the United States, but by the Treaty of Lausanne of 1923 the contracting parties accepted their complete

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in any N. A. T. O. country, the Bonn Convention on the Rights and Obligations of Foreign Forces will govern the position in the Federal Republic of Germany, and a recent Treaty with Libya and a Protocol with Japan deal with the problem in those countries. The service authorities are, of course, under the existing legislation in a position to exercise these rights of jurisdiction in respect of members of the forces, but, except when the forces are on active service, they have no powers to exercise them in relation to civilians. The result is that, with few exceptions, civilians or followers who have to be brought to trial, must be brought to trial in the local courts and, if they are sentenced to imprisonment, must serve the sentence in a local prison.

"* * * The important object of the proposals is to give the military authorities the requisite statutory powers to exercise such jurisdiction over civilians and followers accompanying United Kingdom forces overseas as may be secured by Treaty or other arrangement with the authorities of the overseas territories where the troops are serving. * * *"

[21] On the general subject of extraterritorial jurisdiction, see Brown, *Foreigners in Turkey: Their Juridical Status* (1914), Chap. II; 2 Hackworth, *Digest of International Law* (1941), 493; 2 Hyde, *International Law* (2nd Rev. Ed., 1945), 849, where an elaborate bibliography may be found.

[22] Fenwick, *International Law*, 3rd ed., 273.

abolition[24] and the United States acceded to the abolition in a separate treaty signed in 1931.[25] Extra-territorial rights were terminated in Iran by unilateral action of the government in 1927.[26] More recently, in June 1956, the United States relinquished consular jurisdiction in Morocco by Joint Resolution of Congress.[27] The Soviet Union recently recognized the right of Poland to try Russian troops and dependents in Polish courts.[28]

At the time the Joint Resolution to relinquish consular jurisdiction in Morocco was under consideration by the Congress, the Secretary of State, in his recommendation to the Senate Committee on Foreign Affairs stated rather pointedly that the relinquishment of this jurisdiction appeared as "the only course in keeping with the high traditions of United States policy and with our sympathies for the aspirations of peoples moving along the road toward self-government."[29] The remarks made to the Senate on this matter by

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[24] *Foreign Relations of the United States*, v. II (1923), at p. 1153.

[25] *American Journal of International Law*, Vol. 28 (1934), Supp., 129.

[26] See 2 Hackworth, *Digest of International Law*, 532. For the abolition of capitulatory rights in Iraq, see 2 Hackworth, *Digest of International Law*, 517. The United States has a bi-lateral accord with Iraq (TIAS 3108, April 21, 1954).

[27] S. J. Res. 165; see Senate Report No. 2274, 84th Cong., 2d Sess., June 19, 1956.

[28] The Polish-U. S. S. R. agreement signed at Warsaw on December 17, 1956 follows closely the NATO Status of Forces Agreement. An authoritative translation is given in *The New York Times*, December 19, 1956.

[29] Senate Report No. 2274, 84th Cong., 2d sess., June 19, 1956, p. 2.

Senator George, as Chairman of the Foreign Relations Committee, characterized the situation in equally strong and unequivocal terms, as follows (102 Cong. Rec. (daily ed.) 10585):

> Mr. President, it is very important, too, that all of us recognize that the purposes of the joint resolution are fully in accord with America's traditions. A new Morocco has come into being. As it assumes the responsibilities of self-government, it is fitting that we assist it to attain a status of equality with other nations. By voluntarily renouncing the outmoded concept of extraterritoriality, we shall again demonstrate to the world our sympathy with the aspirations of those who have achieved self-government and the rights and responsibilities appurtenant thereto. The exercise of extraterritoriality to many is tinged with colonialistic connotations, which it is in our interest to erase.

Any possible solution to the problem of trying United States civilians by United States civil tribunals sitting in a foreign state would necessarily bear too great a resemblance to the older, resented, system. Even should the United States be constrained by circumstances to request other governments to agree to such extraterritorial jurisdiction, one cannot anticipate acceptance by the various countries involved.[29] And such requests might well

[29] We believe this to be true despite the fact that there has been one such arrangement. The agreements with Great Britain for the leased bases and the Bahamas Long Range Proving Ground uniformly provide that, if a state of war does not exist, the United States shall have exclusive jurisdiction over *security* offenses committed inside the Sites, where the accused is not a mem-

jeopardize the existing willingness of a foreign government to have United States military forces stationed within its country.

3. We think, therefore, that the conclusion is fully justified that, as to offenses which are crimes under the law of the receiving state, the only practical alternative to court-martial is trial by the country where the offense is committed. The original opinion of the Court is clearly correct in stating that, as to the crime of murder involved in the cases before the Court, "* * * the essential choice involved here is between an American and a foreign trial." (351 U. S. at 479.)

It should be noted that this choice extends to a very substantial portion of the crimes for which, under

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ber of the United States Forces, but is a person subject to the Uniform Code of Military Justice, if "a civil court of the United States is sitting" in the leased area. The agreements grant to the United States authority also to try British nationals, aliens and persons not subject to the Code under certain described circumstances, but the agreements provide that in cases of *security* offenses this "jurisdiction shall be exercisable only by a civil court of the United States sitting' in the particular area.

Art. IV, Modification of Leased Naval and Air Bases Agreement, T. I. A. S. 2105 (August 1, 1950); Art. V, each, Bahamas Long Range Proving Ground, T. I. A. S. 2426 (January 15, 1952), T. I. A. S. 3595 and 3603 (June 25, 1956). Parent agreement, Leased Naval and Air Bases, E. A. S. 235 (March 27, 1941).

The areas in which the agreements are to operate are fixed and definite, with the specific boundaries delineated in the agreements. The long term of years for which these agreements were executed, imparting to them a large measure of semipermanency, and the location of the areas involved, in some cases sparse and widely separated by long spans of water, make this a very special situation. It was agreed to originally in 1941 when Britain was at war. The right to set up United States civilian courts has never been exercised.

Article 2 (11), civilians accompanying the armed forces could be tried by court-martial. Not only are the major common law crimes such as murder, larceny, and the like in this category. Many offenses which are directed against the security of the United States also involve breach of security of the receiving state. And even offenses, which in the form in which they are tried by court-martial seem to involve only violations of military regulations, may in actuality involve problems of jurisdiction which would be raised if the American military authorities were rendered powerless to deal with the matter. For example, various black marketeering activities are tried under Article 2 (11) as violations of Article 92, *i. e.*, breach of regulations. Such transactions, however, frequently involve violations of local customs or taxing laws, as to which a waiver of jurisdiction could not be expected if the American authorities were unable to deal with the matter promptly at the seat of the crime. Article 2 (11), in a large part of its coverage, includes offenses triable under the law of the receiving state, and therefore represents a congressional decision to subject American citizens to trial by United States law rather than by foreign law.

We have already discussed, from the point of view of the practical necessities of command (*supra*, pp. 32–37), the difficulties that flow from dividing responsibility from power of supervision and control. It is also well to remember that, from the point of view of the Americans involved who look at the problem prospectively (as distinguished from a particular convicted defendant who hopes to gain immediate advan-

tage from a lack of jurisdiction), the right to be tried under United States law has advantages. It is not a reflection on the standards of other countries to recognize the validity of the Congressional judgment that members of United States military components should, so far as possible, be tried under United States military law rather than the law of a foreign state where our forces happen to be stationed because of United States military commitments.[30] To a certain extent, judicial procedures provided by some of the foreign governments would fail to accord to an accused rights which we in the United States have considered important in our judicial proceedings. In a number of countries a trial may be conducted without the presence of the defendant. The right against self-incrimination, the right to cross-examine, and other safeguards would not be available in the form known here to Americans who must stand trial in some of the countries where they are stationed. Unfamiliarity with the forms of procedure in itself results in hardship. And leaving out all other points of difference, it is well to remember that the mere fact

[30] As pointed out at pp. 17–18 of our reply brief, the sentiments of the United States public, as reflected in Congressional policy, seem to be that trial under United States law is the preferred alternative. As there pointed out, this sentiment was reflected in the advice and consent to the ratification of the NATO Status of Forces Agreement (4 U. S. Treaties, 1792, 1828) and in supplementary agreements with other countries. It has been the policy of this Government, in a large majority of the instances where the problem has arisen, to seek waivers from foreign governments of their primary right to exercise jurisdiction over our nationals in uniform or accompanying our armed forces as civilians.

that proceedings would in most countries be conducted in a foreign language in itself raises problems for any defendant.

The situation of civilian components of a military force is different from that of many other United States civilians in foreign countries, not only because they live more in a United States enclave than do the others and their presence is less casual, but because less volition is involved in their coming to the foreign country. A United States citizen who chooses to tour or to live in a foreign country has chosen to put himself under foreign law. A United States soldier is in a foreign country because the United States has sent him there, and his family is there because he has been sent there. And while perhaps more volition is involved in the case of civilian employees of the armed services, they too are there because of the needs of the United States. Hence, aside from the necessities of responsibility and discipline, discussed above, we suggest that, from point of view of a prospective defendant, he should be entitled to believe that, in being sent to a foreign country by the United States, he will still have the benefits of United States law as much as do the military he is accompanying.

B. AS TO OFFENSES WHICH ARE NOT CRIMES UNDER THE LAW OF THE FOREIGN STATE, BUT ARE CRIMES ONLY UNDER AMERICAN MILITARY LAW, THE ALTERNATIVE TO COURT-MARTIAL JURISDICTION IS NO TRIAL AT ALL

So far as the cases before the Court are concerned, which involve murder, a crime under the local law, the question of alternatives is disposed of by the considerations discussed above. Article 2 (11) does, however, cover other categories of crimes which we dis-

cuss more briefly in the interests of a complete presentation of the problem before the Court.

The NATO Agreement, and others in the same pattern, distinguish between concurrent jurisdiction where the act is an offense against both sovereignties and exclusive jurisdiction where the act is an offense under the laws of one sovereign. The military authorities of a sending state have been accorded exclusive jurisdiction to try members of their armed forces and civilian components for acts which are an offense only under laws of the sending state.

In the category of offenses which under these treaties are subject to the exclusive jurisdiction of United States military authorities are many violations of regulations governing a particular area, and punishable as violations of Article 92.[31] The nature of these regulations is discussed *supra*, pages 29–30, and at pages 7–12 of our reply brief. While, as noted above, many of such offenses may also involve violations of local law in different form, there are others which are offenses only against the United States, including, in the Far East, narcotics offenses. Also in this category are many of the offenses which in actual practice have been tried by inferior courts-martial. See e. g. Appendix B, *infra*, p. 130.

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[31] That article provides:

"Any person subject to this chapter who—

"(1) violates or fails to obey any lawful general order or regulation; or

"(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

"(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct."

As to these offenses, the alternative to trial by court-martial is, as a practical matter, no trial at all. Certainly that is true at this time. By hypothesis, the offenses in this category are not offenses under the law of the receiving state and therefore are not triable in its courts. Most of them are not now offenses under the general criminal laws of the United States. They are legally, what they are practically, violations of military law because they contravene the rules governing the conduct of military affairs in a military area.

We may assume that Congress would have the power to make acts of American civilians accompanying the armed forces violative of military regulations relating to a particular overseas area an offense against the United States, punishable in the civilian courts of the United States. This theoretical power would be for the most part completely ineffective as a method of enforcement of the type of regulation here involved. Enforcement of health, welfare, and disciplinary measures relating to a particular area must be swift and local if it is to be effective. The difficulties of transporting witnesses and trying a case far from the scene of the crime make it evident that no attempt could be made to try any but the most flagrant violations. The delays necessarily incident to any such distant trial would seriously undermine the deterrent effect inherent in prompt action even if trial eventually were had. Moreover, even in flagrant cases, trial cannot be assured. This type of violation is not now generally subject to extradition since our treaties for the most part cover only major common-law types

of crimes recognized by both states. See 4 Hackworth, *Digest of International Law*, 41–45. A civilian not subject to military discipline, whose operations in violation of military regulations had been gross and profitable, might find an easy way of escaping punishment merely by refusing to return to the United States.

The only alternative to trial by court-martial for this type of military offense that could be effective to deal with the problem would be, not only to make the offense a civilian crime, but also to provide some on-the-spot tribunal for the trial of such civilian offense. Although an attempt to negotiate for some such civilian tribunals would not be an attempt to have United States courts sit in a foreign country for trial of an act which is a crime under the laws of that country, we nevertheless believe that, for the reasons discussed above as to offenses under foreign law (*supra*, pp. 49–53), consent to any such arrangement could not be anticipated. The stigma which attached to consular courts is too recent and the distinctions between that system and any proposal for a system of American civilian courts in foreign territory would be too fine to justify the expectation that any such proposal would find general or ready acceptance. Rising nationalism is not likely to accept the concept of foreign civil courts on local soil. Even the taking of depositions in ordinary United States civil litigation has sometimes presented problems.

Moreover, the difficulties from the United States' standpoint of an attempt to set up such a civil tribunal, which would accord the degree of due process

and appellate review now available in military tribunals, are fairly obvious. Even such a matter as assuring adequate counsel for a defendant would present problems which are now taken care of as a matter of course in military practice. And, if it should be deemed that, for the trial of an act made an offense against the United States, there would have to be the equivalent of a trial for a crime in the United States, the difficulties become even greater, both from the point of view of establishing a workable system and of securing foreign acceptance to such a system. We need not dwell on the problems of providing judges with life-time tenure, and of organizing a grand and petit jury system within the limitations of American personnel available overseas. A regular system of civilian courts to try civilians in foreign territory, even for crimes against United States law alone, is not, at present, a foreseeable alternative to trial by court-martial.

C. ONLY FOR EXTRATERRITORIAL OFFENSES AGAINST THE GOVERNMENT OF THE UNITED STATES IS TRIAL BY CIVILIAN COURTS IN THE UNITED STATES A POSSIBLE ALTERNATIVE TO COURT-MARTIAL, AND EVEN AS TO SUCH OFFENSES SERIOUS PRACTICAL PROBLEMS WOULD BE PRESENTED

There is one, special, limited group of offenses not involved in the cases now before the Court where civilian trial in the United States can be said to be possible. Our law has long recognized that there are offenses against the government of the United States which may be committed outside the territory of the United States. *United States* v. *Bowman*, 260 U. S.

94. Treason, espionage,[7] and fraud against the government fall in this class. Such offenses are, by definition, crimes against the United States and not crimes under the law of a foreign country, although some of the acts done may also be a crime against the law of the local state. The offense as such is, however, a violation of United States law alone and as such is triable in United States courts if jurisdiction over the offender can be obtained and the necessary proof adduced.

This category of offenses does, therefore, present special problems not now before the Court. We do wish to point out, however, that even as to this type of offense, where trial in a civilian court is now legally available independently of treaty arrangements with a foreign country, a civilian trial in the United States is not a wholly adequate solution. The problems of a distant trial—on which we have already touched (*supra*, pp. 35–36)—exist in this type of case, also. We do not refer to trials for treason. The gravity of this offense is such that we can well assume that, whatever difficulties may be involved in trial far from the scene of the offense (difficulties which would affect a defendant as well as the prosecution), the trial should be in our courts.

The extraterritorial offenses which have thus far

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[7] Even as to espionage there is doubt as to whether conduct within a foreign country is a crime against the United States under the present statute in view of its language making it apply "within the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United States." 18 U. S. C. 791.

actually been tried under Article 2 (11) are cases of minor fraud against the United States and bribery of United States officers. In seriousness and character, these are usually comparable to violations of base regulations. The necessity, from the standpoint of command, of the power to deal with any such infractions promptly and on the spot is equally great. And it is well to repeat that, as the venue provisions of our Constitution recognize, a trial at the scene of the crime is considered a benefit to a defendant, rather than to the prosecution. Moreover, there are risks of evasion since, as already suggested, many extradition treaties do not cover this type of offense.

In any event, the problem of which court should try a defendant where his offense abroad is a violation both of the Uniform Code of Military Justice and of an existing United States criminal statute is not here now; and whatever the answer to that question may be it does not solve any problem as to these offenses. As to the offenses here involved, the United States has the right to exercise only such jurisdiction as the foreign country has been willing to agree to, and that concession has been made to United States military courts.

In short, as to the majority of offenses which may be committed by civilians overseas, the alternative to court-martial jurisdiction is trial under foreign law in foreign courts. As to crimes which are not offenses under the law of the receiving state, the alternative in all but rare instances is, in actuality, no trial at all.

III. ARTICLE I, SECTION 8, CLAUSE 14, OF THE CONSTITUTION IS PROPERLY READ IN CONJUNCTION WITH THE NECESSARY AND PROPER CLAUSE TO CONSTITUTE A BROAD GRANT SUSCEPTIBLE OF EXPANSION UNDER CHANGING CIRCUMSTANCES

The Court has invited discussion of the following material:

> 2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court-martial jurisdiction authorized under Art. I, § 8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the conclusion that the Art. I, § 8, cl. 14, power was thought to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

We think that the historical materials discussed below show that the power to make rules for the government of the land and naval forces, conferred by Article I, section 8, clause 14, is, like other enumerated powers, to be read with the necessary and proper clause, and that it was not a power thought to have a fixed and rigid content but rather was explicitly considered to be a broad grant "without limitation" enabling Congress to use means that were then "impossible to foresee." The framers of the Constitution were aware that power to provide for defense had to be flexible to meet unforeseen emergencies. They did

not hobble a new nation in regard to its defense forces. They undertook to avoid the risk of military abuses not by limiting the power or scope of the army but by making the army subject to control by the elected representatives of the people.

A. THE HISTORICAL MATERIALS SHOW THAT PROTECTION FROM MILITARY EXCESSES WAS TO BE ACCOMPLISHED BY MAKING THE ARMY SUBJECT TO CONTROL BY THE NATIONAL LEGISLATURE, NOT BY CONFINING MILITARY AUTHORITY IN THE CONSTITUTION.

1. The Constitution was drafted and adopted against a background of military abuses by the British king. As early as 1628, people in England were complaining about the encroachment of the military on the civilian population and the use of military tribunals to try common law crimes and civilians. The Petition of Right, 3 Chas. 1, c. 1, presented to the Monarch in that year set forth as a grievance that authority had been given to try "Soldiers or Mariners, or other dissolute Persons joining with them" by court-martial "as is used in Armies in Time of War." [3] As a result of continued abuses by the monarch the Bill of Rights was passed in 1689.[4] This act among other things prohibited the raising and keeping of a standing army within the kingdom in time of peace without the consent of Parliament.

The Declaration of Independence reveals that complaints and fears of a military establishment were not confined to the homeland. That document regis-

[3] Fairman, *The Law of Martial Rule* (2d ed., 1943), p. 9.

[4] 1 Wm. & Mary Sess. 2, Ch. 2.

ters four separate complaints against the use of the military by the monarch:

> He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.
>
> He has affected to render the Military independent of and superior to the Civil power.
>
> * * * * *
>
> For quartering large bodies of armed troops among us:
>
> For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

When the framers of the Constitution met at Philadelphia, this fear of military power was present in the minds of some delegates and was expressed several times throughout the proceedings. Proposals were made to protect the country from future military abuses by limiting the power of the military. At one point during the proceedings, for example, an amendment was proposed which would have limited the size of the standing army in time of peace to a specific number of men.[35] The resolution was defeated, however, after debate which urged that there was "no room for Mr. Gerry's distrust of the representatives of the people." 5 Elliot's Debates, 442, 443. That this fear of the military was considered at both the Federal Convention and the State conventions is further indicated by speeches made in the various State debates. Luther Martin, the Attorney General

[35] The figure suggested was two or three thousand. 5 Elliot's Debates, 443.

of Maryland, for example, speaking before the convention in that State dwelt at length on the fact that the fear of a standing army was expressed by the minority at the Federal Convention but was rejected by the majority. *Secret Proceedings and Debates of the Federal Convention*, pp. 59–62.

At another point during the constitutional convention it was proposed to include language critical of standing armies by making an addition to the clause granting Congress the power to provide for organizing, arming and disciplining the militia as follows:

> and that the liberties of the people may be better secured against the danger of standing armies in time of peace. [5 Elliot's Debates 544.]

The proposal was rejected by a vote of nine States to two. Far from imposing strict limitations on the power of Congress to raise and maintain armies and provide for their government and regulation, the majority of delegates refused even to incorporate language in the nature of a *caveat* into the Constitution. While it was provided that no State should without the consent of Congress keep troops or ships of war in time of peace, the power of the United States to do so was not limited.

Attempts were again made to include restrictions on federal military power during peace time at the time of the adoption of the Bill of Rights. Several States proposed amendments calculated to limit a standing army in time of peace.[38] None was ever

[38] Elliot's Debates, Vol. 2, p. 406; Vol. 3, p. 660; Vol. 4, p. 245.

adopted. The only explicit restriction on military power contained in the Bill of Rights is the Third Amendment relating to the quartering of soldiers in private houses.

As this recital shows, the basic decision made by the constitutional convention, repeatedly, was to obtain protection from the sort of military abuses suffered in the past at the hands of the British crown, not by tying the hands of the military, but by making the military subject to control by the popularly elected legislature. The power to raise and support armies was given not to the executive but to Congress. The power to make rules for the government and regulation of the land and naval forces was again not left in the hands of the executive but given to Congress.[37] To assure that the military at all times remained under the control of Congress the Constitution provided that no appropriation of money for the use of the army should be for a longer term than two years. The framers believed that by placing the power to raise and support armies in the legislative branch of the government and limiting military appropriations to two years they had succeeded in obviating the

[37] The clause granting Congress power to make rules for the government and regulation of the land and naval forces was included in the final draft of the Constitution without either discussion or debate. The only reference to the clause itself appearing in Madison's Journal is the following (5 Elliot's Debates 443):

"A clause, 'to make rules for the government and regulation of the land and naval forces' was added from the existing Articles of Confederation."

Neither the original draft presented to the convention nor the draft submitted by the "Committee of Detail" contained the clause. 5 Elliot's Debates 130, 379.

dangers found in the English system. This thought was perhaps best stated by Hamilton when he wrote:

> "* * * the whole power of raising armies was lodged in the *legislature*, not in the *executive*; * * * this legislature was to be a popular body, consisting of the representatives of the people periodically elected; * * *."

2. This discussion indicates the general framework of the constitutional scheme dealing with our problem. Proposed restrictions on the use of military authority in peacetime were rejected; broad and general powers to control the military were given to Congress. Against this background, we reach the precise question: What construction was placed on the Congressional power to make rules for the government of the land and naval forces? Was this power thought to have a fixed and rigid content or to be a grant susceptible of expansion under changing circumstances? The answer comes from *The Federalist* itself.

In *The Federalist*, Number 23, Hamilton discussed the military powers which would be given to the federal government by the Constitution then under consideration by the States.[39] In explaining the power

[39] *The Federalist*, No. 24.

[40] The authoritative nature of the construction placed on the Constitution by *The Federalist* is inherent in the circumstances in which it was written. Following the convention, Hamilton, Madison, and Jay wrote the essays collectively known as *The Federalist* as newspaper articles, answering criticisms against the proposed Constitution and urging its adoption. They may be compared with statements made on the floor by a sponsor or manager of a particular piece of legislation. This Court has frequently relied, it goes without saying, on *The Federalist* in interpreting the Constitution. *E. g., United States* v. *Pink*, 315 U. S. 203, 230; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 109.

given Congress to make rules for the government of the army and the navy, Hamilton explained that this properly was left without limitation so that Congress could use a great variety of means to meet changing circumstances:

> The authorities essential to the care of the common defence, are these: to raise armies; to build and equip fleets; *to prescribe rules for the government of both;* to direct their operations; to provide for their support. *These powers ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.
>
> * * * * *
>
> * * * Shall the union be constituted the guardian of the common safety? Are fleets and armies, and revenues, necessary for this purpose? The government of the union must be empowered to pass all laws, *and to make all regulations which have relation to them.* * * *
>
> * * * * *
>
> Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous

> to deny the federal government an unconfined authority in respect to all those objects which are entrusted to its management. * * * A government, the constitution of which renders it unfit to be entrusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the national interests. Wherever these can with propriety be confided, the coincident powers may safely accompany them. [Emphasis added.]

This is surely a clear and authoritative statement that the power to make rules for the government of the armed forces was intended to give Congress the power to use means the "extent and variety" of which it was "impossible to foresee or to define". The power was considered to be coextensive with all the possible combinations of circumstances. Congress was to have the power "to make all regulations which have relation to" the fleets or the armies.

Hamilton was a distinguished army officer who undoubtedly knew that civilians under certain circumstances were subject to court-martial jurisdiction. His discussion of the powers given Congress to make rules for the government and regulation of the land and naval forces cannot be read to mean that that power was to be fixed and limited to meet only the circumstances that then existed. Rather, his language shows that the power to make rules for the government of the forces was understood to be capable of development to meet unforeseen exigencies. His definitive words accord fully with the general spirit in which the framers dealt with military power.

There is thus no historical or textual reason why the authority conferred by Article I, section 8, clause 14, like other enumerated powers, should not be read in conjunction with the necessary and proper clause. Our Constitution, drafted in the eighteenth century, has been found workable in the twentieth because the framers and the men who were subsequently called upon to interpret it recognized it as a flexible, rather than a rigid, document. There is no reason why the power to provide for defense needs should be less flexible than any other power, and in fact there are grounds why it should be more flexible. No doubt the framers did not envisage the time when the United States would have large military contingents stationed abroad with their families; nor did they envisage the complexities of modern war and defense which require the services of civilian experts as well as soldiers. But they knew that unforeseen situations in relation to defense could arise and they drafted a Constitution with that thought in mind.

Nothing in the history of Article III or the Fifth and Sixth Amendments detracts from this conclusion. The journals of the state and federal conventions fail to reveal anything tending to show a relationship between Article III and Article I, section 8, clause 14. In the federal convention the provision for a trial by jury in criminal cases was apparently accepted without question.[41] In the majority of the state conventions the debates centered on the failure of the Constitution to provide for trial by jury in civil

[41] 5 Elliot's Debates 381, 484, 550, 563.

cases." The exception, incorporated in the Fifth Amendment, for "cases arising in the land and naval forces" was apparently not a subject of controversy.

3. Thirty years after the Constitution was adopted, the scope of the necessary and proper clause was considered by the Court in *McCulloch* v. *Maryland*, 4 Wheat. 316. Whether Chief Justice Marshall's notable opinion for the unanimous Court is considered as historical evidence or as legal authority it presents a view of the Constitution, and of the power of Congress to adopt laws which it believes necessary to meet the responsibilities placed upon it, which is fully applicable to these cases:

> * * * A constitution, to contain an accurate detail of all of the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.
>
> * * * * * *
>
> But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be

[a] 2 Elliot's Debates 515; 4 Elliot's Debates 143, 151; *The Federalist*, No. 83.

> necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." * * * [pp. 407, 411–412.]

In famous words, the proper interpretation and scope to be given the necessary and proper clause were stated (at pp. 421 and 423):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

And that Chief Justice Marshall considered the necessary and proper clause to apply to all of the enumerated powers of Congress is clear from the following (at p. 423):

> * * * But where the law is not prohibited, and is really calculated to effect *any of the objects entrusted to the government*, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. [Emphasis added.]

It may be true, as stated in *Toth* v. *Quarles*, 350 U. S. 11, 23, that the scope of clause 14 is limited to "the least possible power adequate to the end proposed." But *Anderson* v. *Dunn*, 6 Wheat. 204, the source of this particular principle, which dealt with the contempt powers of Congress, reaffirms the cognate principle stated in *McCulloch* v. *Maryland* that the necessary and proper clause is applicable to all the powers enumerated in Article I, section 8 (p. 225):

> There is not in the whole of that admirable instrument [the Constitution], a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

These tests, stated so long ago, are still controlling in the cases which now confront the Court. The power to provide for the government of the "land and naval forces" is not a clause of fixed content, incapable of expansion beyond the jurisdiction known to the framers. It takes full sustenance from the necessary and proper clause, and has its roots, as Hamilton pointed out, in the framers' latitudinarian concept of Congress' military power and authority. That the power to make rules for the government of the "land and naval" forces was not rigidly limited to the exact jurisdiction known to the framers is apparent from the recognized power to make rules for the government of an air force. The extension of jurisdiction from settlers and camp followers in the field in the eighteenth century to military em-

ployees and dependents overseas in the twentieth is the same kind of application of a recognized constitutional power to new circumstances.

B. SINCE COURT-MARTIAL JURISDICTION OVER SOME CIVILIANS WAS RECOGNIZED AT THE TIME OF THE ADOPTION OF THE CONSTITUTION, ARTICLE 2 (11) IS MERELY THE ADAPTATION OF KNOWN CONCEPTS TO PRESENT-DAY CONDITIONS

Once it is recognized that the power to make rules for the land and naval forces is, like other enumerated powers, subject to the necessary and proper clause, it follows, for all the reasons discussed above, that Congress was acting within constitutional limitations when it provided for court-martial jurisdiction of civilians accompanying the army into the territory of a foreign power as part of our armed contingent overseas. Some civilians were already, at the time of the Constitution, subject to court-martial jurisdiction. The fact that civilians may be subject to military trial does not, therefore, represent a departure from concepts with which the framers were familiar. There has been merely an enlargement of the class of civilians subject to the power in line with the practical realities of the position of such civilians as part of a visiting military unit in the twentieth century. The extension of power is less great than the developing concept of interstate commerce in the light of twentieth century developments in communication.

We have already pointed out, at pp. 32–34 of our original brief in No. 701, that the concept of subjecting to military jurisdiction some civilians accompanying armies was not new at the time our Constitution

was adopted. The Articles of War of King James II of England, promulgated in 1688 governed victuallers and sellers of spirits. Winthrop, *Military Law and Precedents*, 2nd ed. (1920), p. 926. The British Articles of War of 1765 provided for jurisdiction over sutlers and retainers to the camp. Winthrop, *op. cit.*, p. 941.

The Articles of War adopted on June 30, 1775, provided that "All suttlers and retailers to a camp and all persons whatsoever, serving with the continental army in the field" were subject to the rules and regulations of the Continental Army. Winthrop, *op. cit.*, p. 956. This was repeated in 1776 with the change of designation from the "continental army" to the "armies of the United States." Winthrop, *op. cit.*, p. 967. Subsequent to the adoption of the Constitution, the language remained unchanged.

Further evidence that the framers would not be shocked by the thought of subjecting these civilians to military jurisdiction appears from the Articles of War relating to dealings with the enemy. Although the pertinent sections of the Articles of War enacted in 1775 which proscribed dealing with the enemy used the language "whosoever belonging to the continental army," the words "belonging to the continental army" were deleted in 1776, thus expanding the proscribed dealings to a larger class, including civilians. This same broad language was again repeated in the Articles of 1806.[43] While the basis for such Articles is more precisely the law of war or the right of a

[43] Winthrop, *Military Law & Precedents*, 2nd ed., 967, 981.

sovereign to protect its armed forces from spies, it is nevertheless significant that Congress enacted such Articles under its general power to govern the armed forces. The wording indicates that there was no hard and fast conviction on the part of the early legislators, many of whom were intimately associated with the federal constitutional convention or the state conventions, that the power set forth in Article I, section 8, clause 14 had a fixed or rigid content.

Further evidence that the drafters of the Constitution did not intend court-martial jurisdiction to be limited by the Constitution to those persons actually in the armed services is contained in the Fifth Amendment's language that the requirement of a grand jury should not apply to *cases* arising in the land or naval forces."[1] State constitutions adopted about the same time used similarly broad language. The identical phrase was used in the Pennsylvania Constitution of 1790 (Article IX, Sec. X) and in the Delaware Constitution of 1792 (Article I, section 8). The New Hampshire Constitution of 1783 provided for a jury trial for capital offenses "excepting for the government of the army and navy" (Sec. XVI). Nothing suggests that the legislatures, which were given the power to make laws for the government of the army and navy, were not given the power to decide what cases reasonably fell within that category. That under the general scheme which was adopted both by the States and by the United States the legislatures were

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[1] The same exception is read into the requirement of a jury trial in the Sixth Amendment. *Ex parte Quirin*, 317 U. S. 1, 40.

to have power to expand court-martial jurisdiction to the extent necessary for the government of the forces is made clear in the Massachusetts Constitution of 1780:

> XII. * * * And the Legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.
>
> * * * * * *
>
> XXVIII. No person can in any case be subjected to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army and navy, and except the militia in actual service, *but by authority of the legislature.* [Emphasis added.]

Here is stated expressly what we believe is implicit in the Federal Constitution: that consistent with the guarantee of a jury trial for cases not arising in the land or naval forces the legislature is given certain authority to determine what persons not actually in the army or navy were to be subject to court-martial because of their connection with the military. We submit that the Federal Constitution, which has no prohibition against the extension of court-martial jurisdiction, should not be construed as more restrictive than the Massachusetts Constitution which has such a prohibition.

Further, "Forces" historically is not synonymous with "armed forces" and never has been.[44] The early forces of England included the mariners of the mer-

[44] Cong. Globe, 37th Cong., 3d Sess. 955, *et seq.*

chant vessels in which the servicemen were transported."[46] The ancient Court of Chivalry heard the cases of nonmilitary persons connected with the armies."[47] Noncombatants accredited by military authority are treated when captured as a part of the land forces."[48] As early as 1895, this Court recognized that the constitutional phrase, "in the land or naval forces," did not necessarily restrict its application to the uniformed personnel of the armed forces. *Johnson* v. *Sayre*, 158 U. S. 109.

This historical evidence, taken together, indicates, as we have suggested, that the exercise of court-martial jurisdiction over civilians accompanying the armed forces overseas is not an undue departure from a pattern known to the framers of the Constitution. It is merely an adaptation of known concepts to changed circumstances. The expansion of power over civilians overseas occurred in 1916 (see our original brief in No. 701, pages 34–37) because in 1916 the United States emerged as a world power with world-wide commitments. The necessity for this type of jurisdiction is, as we have also pointed out, even greater now when the United States is under an obligation to keep large contingents stationed as a unit in the territory of friendly foreign powers. Just as it was a reasonable regulation of the armed forces in 1776 to provide for court-martial jurisdiction over cer-

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[46] 45 U. S. Naval Institute Proceedings 355, 367.

[47] 9 U. S. Naval Institute Proceedings 692, 694–696.

[48] Geneva Convention Relative to Treatment of Prisoners of War (1949), Art. 4A (4).

tain civilians dealing with the armed forces in the United States, it is reasonable now to provide for military control of Americans accompanying the armed forces abroad. To meet these new circumstances should not require a constitutional amendment. The Constitution is broad enough to enable the United States to assume, in relation to friendly foreign powers, the jurisdiction which those powers are willing to confer upon the United States military forces, the right to govern the whole contingent which is present in foreign territory because of the military needs of the international community."

Certainly to the extent that crimes committed by civilians accompanying the armed forces overseas, (including the crimes of murder in the cases before the Court) are not crimes to which the United States Constitution by its own terms would apply (*In re Ross*, 140 U. S. 453), but are local crimes under the law of the host state, there is nothing in the language or history of the Constitution which would prevent

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[49] As Judge Augustus Hand said in *Ex Parte Gerlach*, 247 Fed. 616 (S. D. N. Y.), in dealing with the constitutionality of Article of War 2 (R. S. Sec. 1342, as amended by the Act of Aug. 29, 1916, c. 448, 39 Stat. 651) which permitted trial of civilians accompanying or serving with the armies of the United States outside the territorial jurisdiction of the United States:

"Section 8 of article I of the Constitution is the source of authority for the Articles of War. Congress is thereby given power to raise and support armies, to make rules for the government of land and naval forces, and to make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States. The Articles were enacted in pursuance of the general war power, and ought to be given a broad scope in order to afford the fullest protection to the nation."

Congress from using the existing court-martial system to try civilians for such offenses. As the original majority opinion in this case pointed out, the choice as to such crimes is not between an Article III court and a military court, but between trial under United States law and trial under foreign law. The only question as to such crimes is whether it was reasonable for Congress to implement the right acquired by treaty to try United States civilians under United States law by using the existing court-martial system, rather than some other form of tribunal for that purpose. The historical evidence we have discussed shows that there is nothing to bar the reasonable Congressional decision that the court-martial—the only legislative tribunal available—may properly be utilized as the vehicle for trial of civilians accompanying the armed forces abroad.

IV. THE CONSTITUTIONAL DISTINCTION BETWEEN MAJOR CRIMES AND PETTY OFFENSES IS NOT A RELEVANT DISTINCTION FOR PURPOSES OF COURT-MARTIAL JURISDICTION OVER CIVILIANS IN FOREIGN TERRITORY

The fourth question posed by the Court is: "The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses." We show below that the distinction, which marks the line for which jury trial is or is not required under Article III and the Sixth Amendment, has no relevance to courts martial or to any trials outside the territorial limits of the United States because in neither case is Article III or the Sixth Amendment applicable to such trials. Only if the Court were now to overrule

prior decisions and hold that the Sixth Amendment applies to trials outside the United States could the distinction have any relevance. An attempt now to draw such a distinction with relation to trials of civilians accompanying the armed forces into foreign territory would be extremely difficult to implement and would leave unsolved many of the problems which Article 2 (11) was designed to reach and which are now being handled under existing international treaties.

A. THE CONSTITUTIONAL POSITION OF PETTY OFFENSES

1. Although the term petty offenses is not mentioned in the Constitution, it has long been recognized that, as a matter of construction, the guaranty of a jury trial in Article III and the Sixth Amendment does not extend to petty offenses of the type which, at common law, could be tried without a jury. *Callan* v. *Wilson*, 127 U. S. 540; *Schick* v. *United States*, 195 U. S. 65; *District of Columbia* v. *Colts*, 282 U. S. 63; *District of Columbia* v. *Clawans*, 300 U. S. 617; see also *Ex parte Quirin*, 317 U. S. 1, 39; and see Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. Law Rev. 917 (1926).

Exactly what a petty offense is for the purposes of this constitutional classification is not a simple matter. Although the decisions cited above all refer to the standard of cases tried without a jury at common law, this is not a test which can be automatically applied. There are now many regulatory-type offenses not known to the common law; moreover, the common law standard itself is not clear. As the

cited article in 39 Harvard Law Review develops in detail, by 1776 Parliament had gradually expanded the summary criminal jurisdiction of English magistrates so that at least a hundred different offenses were tried without a jury, some of which would probably now be considered as too serious to fall within the petty offense category. This Court apparently so recognized in *District of Columbia* v. *Clawans,* 300 U. S. 617. There, in upholding the right to treat as a petty offense the charge of engaging in the business of a dealer in second-hand property without a license, for which the maximum penalty was a fine of $300 or three months' imprisonment, the Court said (300 U. S. at pp. 627–628):

> But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much.

Both the nature of the offenses and the maximum permissible punishment have been considered by the Court in determining whether an offense is a petty one. The punishment actually imposed is not determinative. In *Callan* v. *Wilson,* 127 U. S. 540, where a defendant was charged with conspiracy in the Police Court of the District of Columbia and fined $25, the Court held that his conviction without a jury was improper since the crime of conspiracy was not a trivial offense. And in *District of Columbia* v. *Colts,* 282 U. S. 63, 73, where the crime of reckless driving was subject to a fine of $100 and imprisonment of not

more than 30 days, the Court nevertheless held that a jury trial was required since the offense was not merely malum prohibitum but "in its very nature is *malum in se*." In general, the test for a petty offense seems to be that suggested by *District of Columbia* v. *Clawans*, 300 U. S. 617: Petty offenses are infringements of local police-type regulations, the moral quality of which is relatively inoffensive (300 U. S. at pp. 625, 630), and for which only a relatively minor penalty can be imposed (300 U. S. at pp. 627–628). See Frankfurter and Corcoran, *op. cit.*

18 U. S. C. 1 (3) now defines as a petty offense "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or fine of not more than $500, or both." While this definition does not take into consideration the nature of the offense, which the decisions of this Court indicate must also be considered, it will probably prove adequate for constitutional purposes in the civil courts of the United States since the six-month maximum is usually fixed only for violations of regulatory, police-power statutes of the type that may properly, under the cases, be treated as petty offenses. The definition has not been called into question because it has been held that, even though petty offenses may be tried without a jury, Congress must specifically provide that there shall be no jury. *Smith* v. *United States*, 128 F. 2d 990 (C. A. 5).[10] Except in limited areas, discussed below, Congress has not so provided.

[10] In so ruling, the Fifth Circuit followed the analysis in the dissenting opinion of Mr. Justice Harlan in *Schick* v. *United States*, 195 U. S. 65, even though there was some language in the

2. While the exemption of petty offenses has, as a matter of construction, been read into the guaranty of jury trial in Article III and the Sixth Amendment, it is by no means clear that the same exemption can also be read into the provision of Article III for judges having life-time tenure.

The issue has not yet been presented for decision. Until 1940, Congress provided for non-jury trial of petty offenses before judges having less than life-time tenure only in the territories, the District of Columbia, and various national parks,[81] *i. e.* areas in which legislative courts, not deriving their power from Article III, could constitutionally act. See *Kendall* v. *United States,* 12 Pet. 524; *American Insurance Co.* v. *Canter,* 1 Pet. 511; *Ex Parte Bakelite Corp.* 279 U. S. 438, 449. Since 1940, the Petty Offense Act (54 Stat. 1058), now 18 U. S. C. 3401, provides for trial of petty offenses in the continental United States before commissioners (*i. e.,* persons not having life tenure) "in any place over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction * * *". See also as to national parks, 28 U. S. C. 632. But, even in these limited areas, Con-

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majority opinion pointing the other way. See 195 U. S. at pp. 70–71, where the Court said "There is no act of Congress requiring that the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury."

[81] The earlier national parks legislation, enumerated in the notes to Rule 54 (b) (4), F. R. Crim. P., was repealed by the revision of Title 28, and is now covered by 28 U. S. C. 632 making applicable 18 U. S. C. 3402 discussed in the text. The constitutional problems presented by this legislation were not the subject of judicial decision.

gress has provided for trial before commissioners only with the consent of the person involved, and only after the defendant has been apprised of his right to be tried before the district court. 18 U. S. C. 3401 (a) and (b). Since consent alone would not be sufficient to confer jurisdiction (see *McClaughry* v. *Deming*, 186 U. S. 49, 66), the theory of this statute, which has not been questioned, apparently is that in such localities Congress has power, under Article I, section 8, to provide, as in the District of Columbia and the territories, for courts which do not derive from Article III. When consideration was given by the 1943 and 1944 Judicial Conference to extending the pattern of 18 U. S. C. 3401 to petty offenses under the general laws of the United States, it was recognized that there was a serious constitutional question of the power to do so, although members of the Committee refrained from reaching any conclusion since the matter might be presented for judicial determination. Judicial Conference, *Report of the Committee of the Trial of Minor Offenses by Commissioners*, September 22, 1944.

It is, therefore, debatable (at the very least) whether, where an Article III court normally exercises the judicial power in an area, the infliction of punishment, even for petty offenses, does not so necessarily involve the exercise of judicial power that it must be done by a judge having life-time tenure. Clearly, infliction of substantial punishment is the exercise of judicial power. *Wong Wing* v. *United States*, 163 U. S. 228, 237. The same rationale may very well apply to the lesser punishment for petty offenses, so that a lifetime tenure judge would be

necessary even if a trial by jury is not. A petty offense is not a "crime" under either Article III or the Sixth Amendment. But whether the dereliction be a petty offense or a "crime", the accused might properly claim a right under the Constitution to a trial by a *court* and by a judge with life-tenure where the judicial power being exercised is constitutional and derived from Article III. Where legislative, nonconstitutional, judicial power is being exercised and Article III does not apply but the Sixth Amendment does—as in the District of Columbia and the continental territories (*Callan* v. *Wilson*, 127 U. S. 540, 550)—there must be a jury trial except for petty offenses by virtue of the Sixth Amendment. But where neither Article III nor the Fifth [32] or Sixth Amendments apply, the distinction between major crimes and petty offenses has no significance at all.

B. THE RELATION OF PETTY OFFENSES TO COURT-MARTIAL JURISDICTION

Since the distinction between petty crimes and major offenses has no significance where neither Article III nor the Fifth and Sixth Amendments apply, it follows, in our view, that the distinction has no relevance to court-martial jurisdiction of civilians accompanying our armed forces abroad. Neither Article III nor the Fifth and Sixth Amendments applies to offenses committed by such civilians abroad because (1) Congress, under its power to make rules for the government of the land and naval forces, can

[32] Where the Fifth Amendment applies, the test as to trial by indictment is, of course, the distinction between felony and misdemeanor, in which latter class petty offenses fall.

properly subject such offenses to trial by court-martial, as to which Article III and the Fifth and Sixth Amendment admittedly do not apply; and (2) Congress, in implementation of the power of the United States in international relations to obtain from the host state the right to try under United States law United States nationals for crimes committed abroad, may utilize in foreign countries legislative tribunals which are bound neither by Article III nor the Fifth and Sixth Amendments.

1. The first of these theories requires no discussion beyond that set forth in the other points in this brief, as well as in the arguments previously submitted. We have shown that the power to make rules for the government of the land and naval forces, conferred by Article I, section 8, clause 14, of the Constitution, is to be interpreted in the light of the necessary and proper clause. We have also shown that the practical necessity stemming from the responsibility which the military authorities have in relation to civilians accompanying the armed forces abroad to the civilians, the United States, and the host states, justifies their subjection to military law, much as sutlers and retainers to the camp were subjected to military law in the United States at the time the Constitution was adopted. It follows that trial by court-martial of civilians accompanying the armed forces into foreign territory are cases arising in the land and naval forces and therefore not under Article III and the Fifth and Sixth Amendments.

2. The question as to petty offenses posed by the Court is apparently directed to the second of the

grounds discussed above, and particularly to our position that the judgment of Congress in the choice of legislative tribunals for crimes committed abroad is uninhibited by the Fifth and Sixth Amendments. Since, as we have shown, the distinction between major crimes and petty offenses does not mark the boundary between Article III judicial power and non-Article III judicial power—and since Article III judicial power does not extend abroad—we assume that the question is directed to the issue of whether, where the United States does obtain the right to try its nationals for offenses committed abroad for which a legislative tribunal may be used, the Sixth Amendment nevertheless requires a trial by jury for any offense other than petty. In other words, the question is whether trial of civilians for offenses committed abroad would be analogous to trials in a territory or the District of Columbia, *i. e.*, trials for which non-Article III, legislative, courts may be used but to which the guarantees of the Fifth and Sixth Amendments apply.

So to hold would represent a drastic and in our view unwarranted departure from prior decisions of the Court. As we have pointed out, as to all acts which are offenses under the law of the foreign state, basic jurisdiction is in the foreign state; the United States has the right to try such cases only to the extent that the receiving state, through international negotiation, accords that right to the United States. That is the basic rationale which underlies the holding of *In re Ross*, 140 U. S. 453, that, where the United

States receives the right to try a United States citizen for a local crime committed abroad, the trial is not governed by Article III or the Fifth and Sixth Amendments. The United States Constitution, by its own terms, does not automatically apply to such crimes or to such proceedings (see the government's main brief in No. 701, pp. 61–65). That rationale is as valid, perhaps more valid, today than it was at the time of *Ross*. The United States is less free than it was then to decide unilaterally on the procedure to be followed. As we have also pointed out, *supra*, the concept of extraterritorial rights is generally an outmoded one in present day international relations. It is only because military commitments require the presence of a substantial contingent of visiting military force, which in modern times necessarily includes a civilian component, that rights to exercise jurisdiction in a foreign country are conceded. Such rights are conceded only to military authorities because military units have often been considered subject to their own law, and to assure prompt and effective control over the visiting force. Again as discussed above, there is no reason to believe that the cession by the receiving state would be made to other than military authority. If the United States cannot exercise the privilege so granted, the primary right to try the offender remains in the foreign state. We emphasize again that the true choice is not between a United States trial under the Fifth and Sixth Amendments, on the one hand, and a United States military court, on the other; the choice is trial by

United States court-martial under United States law or trial by foreign courts under foreign law.

Even as to crimes which are offenses under United States law alone, this Court has held that trials outside the limits of the continental United States are not subject to the specific requirements of jury trial and indictment specified in the Fifth and Sixth Amendment, but only to the requirement of due process which governs all actions by the United States. As to our insular possessions, it was recognized when we first acquired them that differing historical traditions made impractical and inapplicable the specific guarantees of those Amendments. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Ocampo* v. *United States*, 234 U. S. 91; *Balzac* v. *Porto Rico*, 258 U. S. 298. The reasons are different, but it is less feasible today than ever before to set up United States legislative courts in foreign countries to conduct trials by jury subject to the Fifth and Sixth Amendments. See *supra*, pages 49–54, 60–61.

3. Neither would it solve the problems arising from the presence of civilian components overseas to alter accepted law by making petty offenses triable on the spot by court-martial, but requiring all other offenses to be triable in the courts of the United States, which are, as a practical matter, the only courts that could conduct a trial governed by the Fifth and Sixth Amendments. In the first place, as we have stressed, it is questionable whether for offenses which are crimes under the laws of the host state, those countries would relinquish jurisdiction. Issues of responsi-

bility between the United States and the host country, now working smoothly, would become unduly complicated. As pointed out, *supra*, pages 54–55, there are many types of violations of military regulations, such as black-marketeering, which would also constitute violations of local laws. If military courts on the spot are limited to minor punishment, it could well be, that, for major transgressions, the local government and local public opinion would not permit removal to the United States for trial. See *supra*, pages 49–55, for the fuller discussion which we do not repeat.

Moreover, from the point of view of United States law alone, the distinction between petty offenses and major crimes in relation to court-martial jurisdiction would present many problems. The distinction cannot now be fitted into American military law. As pointed out above, the constitutional definition of a petty offense depends both on the nature of the offense and the maximum punishment. That concept is not embodied in the Uniform Code. The maximum punishment for any offense under the Uniform Code, except some few capital offenses like murder and rape, is set by the President pursuant to the authority conferred by Article 36. Not many offenses now bear a maximum penalty of six months or less, even though in practice this has proved to be the maximum punishment imposed in the majority of cases involving civilians. In fact, strictly speaking, the limitations set forth in the Manual for Courts-Martial (1951), par. 127 (c), are applicable only to enlisted personnel, and are to serve only as a guide in cases of officers,

cadets, or civilians. The significant distinction in military law, with relation to the extent of punishment, is made by the decision as to which type of court-martial should be utilized to try the offender, summary courts being restricted to a maximum sentence of 30 days confinement, and special courts to a maximum of 6 months confinement. Articles 19 and 20. But under the federal decisions discussed above (pp. 83–85), the extent of punishment actually imposed cannot be utilized as a test in determining whether an offense is "petty" for constitutional purposes. Any attempt to distinguish between petty offenses and major crimes for purposes of court-martial jurisdiction would therefore not be effective without Congressional action defining the offenses triable by court-martial as petty and fixing the maximum punishment for such offenses. In the meantime, our treaties with foreign countries relating to jurisdiction over civilians would for the most part be ineffective and negotiations could not be conducted on any firm basis until Congress had acted.

Beyond this, no limitation of court-martial jurisdiction to petty offenses would solve the practical problems discussed in Point I, *supra*, pp. 22–32. In essence, it would mean that minor infractions of regulations could be tried by court-martial, but that, for more serious offenses, only trial in a foreign court or a long-delayed trial in the United States would be available. There would almost be a premium to the offender in committing a serious rather than a petty violation. If reckless driving, for which there was a

maximum sentence of 30 days, is not a petty offense (*District of Columbia* v. *Colts*, 282 U. S. 63), many of the offenses which require the exercise of court-martial jurisdiction today would also not be petty offenses, and under such a theory would require trial by jury in the United States. Even the six month limitation on punishment, which may well represent the constitutional maximum, would be inadequate for many offenses which ought to be dealt with at the place, rather than in the United States. A major currency ring, for example, where foreign witnesses would most likely be necessary, might well find a six-month penalty a minor risk for large profits, and a trial in the United States too dubious to be a deterrent. In sum, it would be wholly unrealistic to hold that the military commander who is responsible for the whole contingent may punish minor infractions, but must rely either upon foreign authority or distant United States courts to punish major ones.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the briefs previously filed in these cases, it is respectfully submitted that the judgment in No. 701 should be reversed and that the judgment of the District Court in No. 713 should be affirmed.

J. LEE RANKIN,
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Assistant Attorney General.
ROGER FISHER,
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Major, USAF,
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JANUARY 1957.

APPENDIX A

Following the Court's ordering of a rehearing in these cases, the views of the various field commanders overseas were requested by the Department of Defense on the practical considerations referred to in the Court's order. We have reproduced in this Appendix the replies received from six of these officers. They are as follows:

Officer	Page
1. William R. Woodward Brigadier General, USA Commanding General Advance Section United States Army, Europe, Communications Zone. [The headquarters responsible for logistical support to U. S. forces in the forward area of France and Germany.]	98
2. Bruce C. Clarke Lieutenant General, USA Commanding General Seventh United States Army. [Headquarters for all United States Army combat units stationed in Western Germany.]	105
3. Charles D. Palmer Lieutenant General, USA Commanding General Headquarters United States Army Forces, Far East, and Eighth United States Army. [Operational headquarters for all United States Army units based in Japan, Okinawa, and Korea.]	110
4. R. F. Good Admiral, USN Commander, Naval Forces, Far East. [Japan, Korea, Okinawa, Ryukyus Islands.]	115
5. J. P. Walker Captain, USN Commander, U. S. Naval Activities, Spain.	120

OFFICE OF THE COMMANDING GENERAL

ADVANCE SECTION (7965)

USAREUR COMMUNICATIONS ZONE

29 Nov. 1956.

Subject: Court-Martial Jurisdiction Over Civilian Dependents.

To: The Adjutant General, Department of the Army, Washington 25, D. C. ATTN: JAGL.

1. The news that the United State Supreme Court has agreed to reconsider the question of the amenability to military law of dependents accompanying military personnel overseas is most disturbing. Reversal of prior Supreme Court rulings on this subject and the subsequent loss of disciplinary power over a substantial portion of the American personnel in the Advance Section, would place me in the invidious position of being responsible collectively for the activities, welfare, morale and safety of military and civilian personnel without jurisdiction over a major segment thereof.

2. Reasons for the continued need for jurisdiction over Department of the Army Civilians and dependents of military personnel in this command are set forth below:

a. I need court-martial jurisdiction over DA Civilians and dependents of military personnel to prevent black-market operations and to punish those who engage in such activities. Under present practices, a person who purchases Post Exchange goods and resells them to a French national, is subject to judicial punishment at the hands of a court-martial and to administrative fine at the hands of French customs authorities. These sanctions have proved necessary

because items such as radios, electric razors and refrigerators sell on the French market for more than twice the American price, with the result that there is a steady black-market demand for them. Dependents of military personnel and DA Civilians are subjected to pressure by their French maids and neighbors to obtain scare items for them. Cooperation between our military and the French civilian authorities have, up until now, kept this traffic to a minimum, while fear of court-martial has supplied a deterrent effect which fear of administrative fine lacks. Disruption of these arrangements would result in an immediate upsurge of black-marketeering, which would at once imperil our excellent relations with the French authorities and jeopardize the very existence of our Post Exchanges. Should the operation of Exchanges be curtailed or closed, the standard of living and the morale of our forces in the Advance Section would lower rapidly.

b. I need court-martial jurisdiction over the DA Civilians and dependents of military personnel to prevent reckless and drunken driving on the public roads in France and on US military installations. Military personnel and DA Civilians must continuously use the French public roads as well as the roads within US military installations. The manner in which they conduct themselves in doing so is a reflection upon the United States and the US military forces in France. Traffic control is a major problem due to the absence of speed limits on the open highways in France, to the narrow winding roads and to the unfamiliarity of our personnel with French traffic conditions and customs. The high accident rate has been a major obstacle in improving the community relationships with the French people. To protect our personnel from the unsafe driving of others and them-

selves, and to maintain friendly relations with the French, I must have disciplinary power since orientation lectures and safety programs will accomplish little without sanctions to support them. It is also necessary that the traffic within our military installations be regulated. If I cannot punish offenders, the alternative would be to invite the French authorities to police our installations. It is exceedingly doubtful if the French would undertake this task. It would be embarrassing to the US military and is precluded by security considerations. Not only should the rights of civilian motorists within our installations be protected but the rights of pedestrians and the children who attend schools within our military installations and who may be maimed or killed by reckless and drunken driving must be considered before placing our civilian motorists beyond US military jurisdiction.

c. I need court-martial jurisdiction over DA Civilians and dependents of US military personnel to enable me to control them in emergencies such as might occur in the evacuation of non-combatants from threatened areas. The evacuation of non-combatants from France and Germany prior to or at the outbreak of war is a major task. In such an operation, instant obedience to commands is required on the part of all of our civilian personnel. Fear of punishment at some remote time or place is not likely to induce our civilian personnel to obey orders under the conditions likely to be encountered in such an evacuation; neither the panic-stricken mob nor the solitary wife who will not abandon her husband is likely to be influenced by a tribunal far removed from the scene. The military must be able to enforce the orders that are issued or it cannot provide the safety of the civilian personnel it must protect.

d. I need court-martial jurisdiction over DA Civilians and dependents of US military personnel to pro-

tect the security of this command and to punish those who imperil such security. Department of the Army civilians often occupy positions of trust and confidence and consequently have access to classified information. Dependents of US military personnel who are not so employed have special opportunities to observe troop movements and dispositions which, if disclosed, would vitally effect the security of our military forces. I cannot maintain this security unless I can have jurisdiction over all personnel who have been exposed to classified information.

e. I need court-martial jurisdiction over DA Civilians and dependents of military personnel to ensure the continued satisfactory operation of the NATO Status of Forces Agreement in the Advance Section. The criminal jurisdiction aspects of this treaty would become unworkable should our disciplinary power over civilian dependents be withdrawn. Article VII, NATO SOFA, vests in us exclusive jurisdiction over offenses not cognizable under French law. It likewise vests in us primary jurisdiction over offenses directed solely against the property or security of the United States (including treason, sabotage and espionage), or against the property or person of its soldiers, civilian employees, or civilian dependents. Furthermore, we are required by our government to seek waiver of jurisdiction in all cases where French jurisdiction is primary. Should our disciplinary power over these civilians be withdrawn, the following consequences would ensue: (1) Crimes cognizable by US law, but not by French law, would go unpunished; (2) Crimes directed against the Army or its personnel would go unpunished unless the French could be persuaded to accept our waiver of jurisdiction and to prosecute with zeal; and, (3) Cases wherein the French have primary jurisdiction would, despite the contrary policy of our government, have to be in each case left

to the French to try. Two comments seem particularly relevant concerning this state of affairs. First, it is extremely difficult to insure the safety of our troops or the success of their arms, when the commander cannot punish those who engage in treason, sabotage or espionage, and when it is doubtful whether anyone else can or will. It is humiliating as well as dangerous to have to call in the French to protect us against treason, sabotage and espionage. Secondly, it is to be noted that where one civilian dependent injures another, such offense would likewise go unpunished; and while it may arguably be just to keep the former from trial by court-martial, it is indisputably unjust to deprive the latter of judicial protection against injury. It is argued that Article 2 (11), Uniform Code of Military Justice, should be held unconstitutional in order to protect civilian dependents; but civilian victims are at least as worthy of protection.

3. It is evident from the above discussion that no relevant distinction can be drawn between major and minor offenses; I need jurisdiction over both. The enforcement of traffic regulations within military installations concerns primarily minor offenses, while protection against treason involved major ones; yet in both cases I must accomplish the enforcement or these regulations will not be enforced.

4. It is equally evident that morale is affected as much as discipline, because discipline directly affects morale. Morale is lowered when offenses go unpunished. In the extreme case, where our troops are exposed to sabotage and are not authorized to protect themselves, it would be seriously understating the case to say that morale would be lowered.

5. The question arises whether there is any possible alternative to military jurisdiction. These appear

limited to two: waiving our jurisdiction to the French; or vesting jurisdiction in an American civilian tribunal. The first alternative seem thoroughly undesirable. The governmental policy of seeking waivers of French primary jurisdiction, deriving from the Senate reservation to NATO SOFA, is an expression of precisely this view. The French have little interest in trying cases not subject to their primary jurisdiction, and there is much difficulty for them in doing so. Where one American has injured another, the witnesses, the background, and the relevant social customs are equally foreign to the French court. Imprisonment of the guilty party costs French money. Investigation of the case costs French money. It is doubtful whether the French would be interested in going to the trouble or expense of prosecution and conviction, unless French nationals or property were involved. From the point of view of the United States, this state of affairs would be equally unsatisfactory.

6. Vesting jurisdiction in an American civilian tribunal would be more desirable, but less practical, than waiving jurisdiction to the French. Such a tribunal would have to be located within France, because transportation of the evidence and the American witnesses to the United States in each case would be too expensive, and because transportation of foreign witnesses to the United States would be impossible. Therefore the tribunal would have to be created in France, with all the attendant expenses of creating judicial machinery, assembling a civilian Bar, etc. Whether it would be worth the trouble and expense is not for me to say. It is to be noted, however, that no existing law or treaty contemplates such a tribunal. NATO SOFA explicitly refers to United States military authorities, and vests in these military authorities

jurisdiction which the proposed civilian tribunal would have to exercise. Likewise I have no reason to believe that France would allow such a tribunal to operate on its soil; if anything, the attitude of French officials and public within the ADSEC area would seem to suggest the reverse. In any event, a civilian tribunal (if it resembled civilian tribunals in the United States) would not bring cases to trial within the time-limitations dictated by our situation. Whereas civilian tribunals frequently take many months before hearing a case, we often have situations (as in the evacuations of dependents) which must be handled immediately. It follows that creation of such a tribunal is no answer to the problem of jurisdiction over civilian dependents.

7. In any event, the administration of justice by a non-military tribunal in cases involving civilian dependents would result in disparity of sentences and a consequent weakening of morale. Where the soldier who hits a civilian receives a different measure of punishment from the civilian who hits a soldier, bitterness and enmity are bound to result. This is particularly true in an overseas community, where the US military and civilians are banded more closely together.

8. The discharge of our mission, as well as the welfare of our men, would be seriously and adversely affected by loss of jurisdiction over civilian personnel.

William R. Woodward,
WILLIAM R. WOODWARD,
Brigadier General, USA,
Commanding.

Copy Furnished:
CINCUSAREUR
CG USAREUR COMZ

HEADQUARTERS

SEVENTH UNITED STATES ARMY

OFFICE OF THE COMMANDING GENERAL

APO 46, NEW YORK, *23 November 1956.*

Subject: Reargument in cases involving Constitutionality of Article 2 (11) UCMJ.

To: The Judge Advocate General, Department of the Army, Washington 25, D.C., ATTN: JAGL.

1. Reference is made to DA Message #473169 requesting the views of overseas commanders with respect to the necessity for retaining court-martial jurisdiction over civilian dependents of military personnel and civilians employed by the Armed Forces overseas.

2. There are approximately 60,000 civilian dependents of Seventh Army military personnel living in Germany today who are an integral part of the Seventh Army military community. This community numbers nearly a quarter of a million Americans spread over a large part of West Germany living in hundreds of different communities. Their transportation to this theater was provided by the military, and in a large percentage of cases they had concurrent travel with their military sponsors. In Germany the military provides them with complete logistical support including housing with furnishings, utilities, maintainance and repair; medical and dental care; commissary and post exchange privileges; religious, educational and recreational facilities; police and fire protection. In every essential of their daily lives, their activities are interwoven with those of the military. The successful performance of the primary mission of the Seventh United States Army, combat readi-

ness, clearly requires that civilian dependents be integrated into the overall military planning. Their close proximity in Germany to the Iron Curtain requires that they be under close military supervision to insure their protection and prompt evacuation in event of the outbreak of hostilities. Since the German government has accepted the Army's position that civilian dependents are a part of the military community, they occupy a privileged status in the German Federal Republic. Under existing treaties they are essentially exempt from the jurisdiction of German courts. Because of their exempt status as a part of the military community the German government expects military commanders to insure their proper conduct and observance of law. In view of the special status of civilian dependents and the supervisory obligation which a military commander assumes in their behalf, it appears only reasonable that civilian dependents should be generally subject to the same legal standards as military personnel. I believe, therefore, that it would be wholly unrealistic to deprive the military commander of the authority to exercise disciplinary control over civilian dependents overseas.

3. Disciplinary actions against civilian dependents have assumed no great proportions in Germany. In fact, court-martial cases involving civilian dependents are comparatively rare. This situation is a tribute to the law-abiding character of the overwhelming majority of our civilian dependents. If the disciplinary incident rate of Seventh Army civilian dependents as a group is compared with that of a city of similar size in the United States I believe the result would be very much in favor of the military dependents. Nevertheless, in any group of this size a few major offenses, as well as a larger number of minor offenses, will in-

evitably arise. Our relations with the German government are embarrassed from time to time by the commission of comparatively minor offenses such as black-marketing transactions with German nationals, unlawful currency transactions, infringement of German customs laws and violations of German traffic laws. Such offenses, moreover, have a direct and powerful impact on the efficiency and discipline of the command. If the military lacks the authority to punish civilian dependents for such offenses, the result would be to increase the incidence of these offenses on the part of the military. A few civilians engaging in unlawful practices in the military community can impair the discipline and hence the combat readiness of a unit. While it is infrequent that a dependent is actually brought to trial for a minor offense the mere threat of such action is a forceful deterrent. In its absence I think the problem would assume greater dimensions. The result would no doubt jeopardize our position as guests of the German nation and prejudice our assigned military mission in Europe. The authority to exercise court-martial jurisdiction over civilian dependents appears to me the only method of dealing effectively, fairly and justly with civilian dependent offenders overseas.

4. I see no practical alternative to court-martial jurisdiction. It has been proposed to make offenders overseas subject to trial in a Federal Court in the United States. Obviously this could only apply to felonies and major offenses. The result would be the loss of authority by any jurisdiction to deal with minor offenses. Insofar as major offenses are concerned, they would be tried thousands of miles away from the place of commission. Extensive delays would be inevitable. If the law cannot be enforced

expeditiously, it loses its deterrent effect. Both the United States government and the accused would face serious problems with respect to the production of witnesses in court. Attendance of German witnesses or other foreign witnesses could be only on a voluntary basis and the testimony of a foreign witness could not be compelled if the witness or his government refused to cooperate. The expense of transporting witnesses would be very great for the government and probably prohibitive for an accused. The consent of the German government would presumably be required before a case could be transferred to the United States for trial and it seems improbable that such consent would be forthcoming in the majority of cases. This would be certainly true in those cases in which the offense affected German nationals or German interests. The proposed alternative of trying overseas civilian offenders in a Federal Court in the United States for either major or minor offenses is therefore deemed impractical.

5. Another possible alternative is for Congress to establish a separate civilian court for the trial of civilians abroad. The possibility of securing from the German government the right to set up such a court in Germany appears remote. Such a proposal would undoubtedly be viewed as an infringement of German sovereignty reflecting adversely upon their judicial system and not justified by the same considerations which have allowed United States military courts to function within the German Republic.

6. The loss of court-martial jurisdiction over civilian dependents would undoubtedly result in their being made amenable to the jurisdiction of German courts. It is my understanding of the present Convention governing relations with the German Republic that the exempt status of civilian dependents rests on

their inclusion in the "Armed Forces" over which the Army exercises primary court-martial jurisdiction. The many objections which have been raised to the assumption of jurisdiction by foreign courts over United States military personnel would be repeated and intensified in the case of civilian dependents.

7. I assume that if jurisdiction were lost over civilian dependents a similar condition would prevail with respect to civilian employees of the Armed Forces. This latter category of civilians has long been considered subject to military court-martial jurisdiction. It appears to me that removing their amenability to court-martial jurisdiction would deal a severe blow to military discipline and efficiency. A very large number of these people, particularly in the supply, maintenance and logistical support fields, are performing substantially the same functions as their military associates. Failure on their part to discharge their responsibilities would seriously impede the mission of the military. Civilian employees, furthermore, have access to classified information, divulgence of which would be highly prejudicial to the national interests. The security of our forces, in such close proximity as we are in Germany to the Iron Curtain, requires that civilian employees should answer in the military courts for any violations. To subject the military personnel to one set of laws and their civilian counterparts to another would produce highly undesirable results. Offenses committed jointly by military personnel and civilian employees, instances of which have occurred in Germany, would have to be tried by different tribunals, one sitting in Germany, the other in the United States. The considerations noted above with respect to trial of civilian dependents in the United States are also applicable in the case of civilian employees.

8. In summary, instances where the exercise o court-martial jurisdiction is required over civilia dependents or civilians employed by the Armed Force are rare. When the exercise of such jurisdiction i necessary, however, I feel that it must be prompt an expeditious. If such jurisdiction is not availabl to the military, the result would be a time lag in th trial of such offenses in other forums, numerous com plications from trials in foreign courts, great expens involved if such trials are held in the United State and other collateral effects which in my opinion woul adversely affect morale, discipline, security, relation with the host country and the accomplishment o assigned military missions. Based on my years o experience in overseas areas, both in Europe and th Pacific, I unreservedly recommend that every effor be made to maintain court-martial jurisdiction ove civilian dependents and civilians employed by th Armed Forces in overseas areas.

Bruce C. Clarke,
BRUCE C. CLARKE,
Lieutenant General, USA;
Commanding.

Info copy to: USAREUR JA.

HEADQUARTERS
UNITED STATES ARMY FORCES, FAR EAST AND
EIGHTH UNITED STATES ARMY
(REAR)
OFFICE OF THE COMMANDING GENERAL, APO 343
SAN FRANCISCO, CALIFORNIA

AFFE-JA 250.4 AG 12 DEC. 1956.
Subject: Constitutionality or Article 2 (11), UCMJ
To: The Adjutant General, Department of the Army Washington 25, D. C., ATTN: The Judge Advocate General.

1. Reference Department of the Army message 473169, 15 November 1956.

2. The Commanding General, Army Forces Far East and Eighth United States Army is responsible for the supervision of military justice within the Army element of the Far East Command, including the members and civilian employees of the Army and their dependents in Japan, Korea, and Okinawa. Within this area seven commanders exercise general court-martial jurisdiction. Korea is the only country to which dependents are not authorized to accompany their sponsors at the present time.

3. There are no existing satisfactory and practical alternatives to the exercise of court-martial jurisdiction over civilian dependents in Japan.

a. Article XVII of the Administrative Agreement under Article III of the Security Treaty between the United States and Japan, effective 29 October 1953, recognizes the concurrent jurisdiction of Japan and the United States over members of our forces (including dependents and civilian employees) for criminal acts committed in Japan. Each country has exclusive jurisdiction over offenses violative of its own law, including security offenses, but not of the other's law. The United States has the primary right to exercise jurisdiction over military personnel and civilian employees for offenses arising from the performance of official duties or solely against the property of the United States, or against the person or property of other members of the U. S. Forces. Japan has primary jurisdiction over all other offenses, including the primary right to exercise jurisdiction over civilian dependents in all cases which involve a violation of the laws of Japan.

b. Japan can, within the framework of the Administrative Agreement, refuse to waive jurisdiction over

dependents who commit offenses in violation of Japanese law. However, because adequate disciplinary measures under U. S. military law are available and have been applied, Japan has elected to exercise criminal jurisdiction in only one case involving a dependent of Army personnel during the past three years. Experience has demonstrated that Japanese criminal trials are extremely slow and protracted. Penal institutions for women and juveniles do not meet the standards of U. S. institutions. Parole and probation procedures are difficult if not impractical to apply to the dependents of military and civilian personnel who make up a large portion of the U. S. Armed Forces communities in Japan. Japanese courts and law enforcement personnel are not as fully apprised of the regulatory needs and disciplinary and morale problems within the U. S. military community as is the local commander. Most offenses of a military nature, e.g., violations of regulations, are usually not punishable offenses under foreign law. Accordingly, if dependents were not subject to U. S. military law, such conduct would go unpunished.

c. For the reason that civilian employees and dependents are now subject to U. S. military law, the United States-Japan Administrative Agreement and its implementing agreements recognized the right and responsibility of the U. S. military forces to police their own installations, including military housing areas, and to police their own personnel, both inside and outside military installations, where only U. S. personnel and property are involved. Japanese police and judicial authorities have waived their right to enter and exercise their normal powers within U. S. installations.

4. The practical alternatives to trial by U. S. court-martial of dependents on Okinawa are unsatisfactory

at best. As Okinawa is under the jurisdiction of a U. S. military governor, a military government court could be established for the trial of civilian employees and dependents. Such a court, however, would still be operated by the military. Return of an individual to the United States for trial is not considered practical as it would generally entail transportation of military as well as indigenous witnesses.

5. If, as seems probable, dependents are admitted to Korea at some future date, the alternative to the exercise of court-martial jurisdiction over such dependents would present problems similar to those enumerated for Japan and Okinawa. The judicial and penal systems and confinement facilities of Korea, which are somewhat backward by U. S. standards, would raise additional problems concerning the protection of those rights guaranteed by the U. S. Constitution.

6. For purposes of court-martial jurisdiction overseas in time of peace, no distinction should or can be made between a civilian dependent and a civilian employed by the Army. In either case the individual is a member of a U. S. military community.

7. Any distinction between major crimes and petty offenses is important to the officer exercising court-martial jurisdiction only insofar as it is necessary to determine what disciplinary action, if any, should be taken. No jurisdictional separation of the two can logically be made. An offender who repeatedly commits minor offenses often presents a more serious disciplinary, morale, and rehabilitative problem than one who commits an isolated serious offense. The unauthorized purchase and sale of merchandise from post exchanges, commissaries, and similar activities and the unauthorized acquisition and disposition of Military Payment Certificates and local currencies, by

civilians as well as military personnel, although relatively minor offenses, have presented a continuing problem to this command because of the concern of the Government of Japan with the effect of these offenses upon the local economy.

8. Jurisdiction by courts-martial over all civilians accompanying the Army overseas is essential because of the manner in which U. S. Armed Forces personnel live in their overseas military communities. In this command, almost all personnel serving in or accompanying the U. S. Armed Forces live in or near separate, closely-knit U. S. military communities which are basically under the control, administration and supervision of the local U. S. Commander who is in turn responsive to the normal military chain of command. This responsibility which is vested in the military commander extends to the administration and supervision of the operation and use of all facilities and major activities of the community including the proper control of occupants and users which is inherent in such supervision overseas. In the absence of a supporting judicial system responsive to the same government as the military, such as is the case existing in the United States and overseas possessions, and as the law enforcement requirement stems primarily from the immediate unalterable responsibilities of the overseas commander and his subordinate commanders, it is essential that the commander be vested with the law enforcement authority commensurate with his responsibilities.

Charles D. Palmer,
CHARLES D. PALMER,
Lieutenant General, U. S. Army,
Commanding.

COMMANDER NAVAL FORCES, FAR EAST
F. P. O. SAN FRANCISCO, CALIF.

In reply refer to CNFE: N12: mr

29 Nov. 1956

Airmail
From: Commander Naval Forces, Far East.
To: Judge Advocate General.
Subj: Court-martial jurisdiction over civilians.
Ref: (a) JAG msg 152054Z of Nov 56.

1. Reference (a) requests views on various aspects of certain problems involving court-martial jurisdiction over civilians. In accordance with reference (a) the following is submitted.

2. "The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas."

Court-martial jurisdiction over civilian dependents in the Far East is a practical necessity because:

(a) Except in Japan, no criminal jurisdiction could or would otherwise be exercised by anyone.

(b) Even considering Japan, the Japanese Government under the US-Japan Administrative Agreement does not have broad enough jurisdiction to handle all criminal offenses involving American civilian dependents.

(c) The control over conduct of civilian dependents, which is absolutely essential if they are to live on naval installations, cannot be maintained unless the ultimate threat of the exercise of court-martial jurisdiction is available. To reduce this to a simple example, it can be stated as a practical fact that enforcement of on-base traffic regulations by our own military police can be effective only because the military policeman is ultimately backed by the existence of court-martial jurisdiction over the offender. In the

United States, enforcement of regulations of this type is based simply on the commanding officer's powers to bar admission of persons to the base. At overseas installations such a barring from the base is not feasible because the dependents reside on the bases and derive all of their logistic support from the bases. This is but a single minor example of a multitude of regulations which are absolutely necessary to an orderly and effective administration of an overseas naval installation.

Beyond the minor regulations necessary to orderly administration of an overseas installation, which is a community in itself, there is the entire field of criminal law and suppression and punishment of crimes as recognized in any well-organized and civilized society that must be administered if people are to live together in any degree of harmony. As will be later asserted, it is our feeling that there is no practical alternative overseas to court-martial jurisdiction, and, thus, that jurisdiction is indispensable to the suppression of and recognized punishment for crimes as known at home.

3. "The practical alternatives to the exercise of jurisdiction by court-martial."

As *possible* alternatives to the exercise of court-martial jurisdiction, the following are submitted:

(a) Elimination of dependent travel to the Far East Command.

(b) Negotiation with the Japanese and other foreign governments with a view toward prevailing upon them to assume complete criminal jurisdiction over civilian dependents.

(c) Conferring jurisdiction on U. S. District Courts in the United States.

(d) Establishing separate United States Courts in the Far East Command areas with criminal jurisdiction over civilian dependents and operating under a

Congressionally enacted penal code and procedural rules offering required constitutional safeguards.

Alternative (a) of barring travel of dependents to the Far East is considered impractical in peacetime because of the extremely adverse effect on morale and attendant weakening of a Navy struggling for its very existence in the highly competitive search for competent and qualified personnel. The alternative appears even less practical when it is considered that such an approach would also call for discontinuance of use of civilian employees overseas. American civilians are widely used in overseas naval installations and our entire Military Sea Transportation Service is dependent almost exclusively on the utilization of American civilian merchant seamen.

Alternative (b) of negotiating a turnover to foreign governments of complete jurisdiction is impractical for many reasons.

Our experience in Japan indicates that the Japanese for political reasons are much more interested in the right to exercise criminal jurisdiction than in its actual exercise. In only a small percentage of cases do they now exercise jurisdiction when they have the primary right. There is serious doubt that they could be prevailed upon to accept jurisdiction of cases where only American personnel and American property were involved. Furthermore, the American political climate appears violently opposed to any further relinquishment of jurisdiction over Americans to foreign tribunals. Such a move would simply separate more Americans from constitutional protections. Although current jurisdictional arrangements with the Japanese have not seriously affected morale, a complete abandonment of jurisdiction over dependents, as a matter of principle, might well jeopardize Navy morale.

It is also manifestly impractical to expect the foreign governments to incorporate into their criminal

law the vast number of minor regulations which are indispensable to the orderly and efficient administration of overseas naval installations.

Alternative (c) of conferring jurisdiction on courts in the United States is obviously impractical. Evidence and administrative obstacles, even in the most serious of crimes, would be insurmountable. The speed so essential to effective administration of criminal justice could not be provided. And it would be impossible to reduce the multitude of regulations which will vary from area to area and command to command to a workable penal code.

Alternative (d) of establishing United States Courts overseas is also impractical. It would involve the creation of a complete police and judicial system for each area. And there would remain the obstacle of legislating a penal code which would adequately cover the varying regulation needs of different areas and commands.

4. "The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents."

No relevant distinctions, for purposes of court-martial jurisdiction, between civilian employees and civilian dependents are readily apparent. Both, at present, accompany the armed forces overseas with full knowledge of their amenability to trial by court-martial. Both accompany the armed forces overseas as free and voluntary acts of their own choosing. Their implied consent to court-martial jurisdiction is certainly as clear as that given when a person voluntarily enters the territory of any State of the United States. And both upon arrival overseas join the communities established at naval installations.

5. "The relevance, for purpose of court-martial jurisdiction over civilian dependents overseas in time

of peace, of any distinctions between major crimes and petty offenses."

Although there are obvious distinctions between major crimes and petty offenses, such distinctions do not influence our needs in this area. On the surface society has lost less when a traffic violator goes unpunished than when a murderer goes free. But the fact remains that orderly and efficient administration of overseas naval installations demands that criminal trial jurisdiction ultimately exist at the disposal of responsible government authorities to effect order and protect the peace and well-being of the sizeable communities that exist at these installations. The responsible government authorities in this instance happen to be exclusively military commanders, but they must still have the authority necessary to discharge their responsibilities to their country and to the world. If their authority to regulate conduct on the installations placed under their sole charge is not backed up in the end by the prospect of trial and punishment of persons allowed on those installations, those responsibilities imposed upon them cannot be properly discharged.

6. It should be borne in mind that the comments submitted herein do not purport to be a discussion of U. S. constitutional law, but simply reflect the practical views of this command. That the effectiveness of our command would be utterly destroyed if control of *military* personnel were lost, is self-evident. And in the final analysis it is the law and court-martial criminal jurisdiction which permit effective exercise of control over military personnel. A factor of loyalty of persons under this command—loyalty to country and its accompanying loyalty to the Navy and the officers thereof—is not overlooked; nevertheless, the cold practicalities force concession that loyalty

alone without the power to exercise criminal jurisdiction would not get the job done. In the end the power to punish provides the power to effectively control. The civilian component of this command and the dependents possess their share of loyalty to country, but at the same time they are active members of large and complicated social communities existing at every naval installation in the Far East Command. Although we have had only very few occasions where we have seen fit to invoke court-martial jurisdiction over a civilian, and those occasions only as virtual last resort, the cold practical fact remains that it is the background power to exercise criminal jurisdiction by court-martial which permits us to maintain our naval overseas communities as orderly social units. Were court-martial jurisdiction as now granted by the Uniform Code of Military Justice declared to be unconstitutional, the impact on our military mission would be severe. The chaos and uncertainty that would undoubtedly follow would seriously jeopardize our mission and might well destroy the effectiveness of this command.

R. F. Good,
R. F. Good.

UNITED STATES NAVAL ACTIVITIES, SPAIN
APO 285, C/O POSTMASTER, NEW YORK, NEW YORK

FF5-3/EF66: GSS: pbr
P17
Ser: 574

29 Nov. 1956.

From: Commander U. S. Naval Activities, Spain.
To: Judge Advocate General.
Subj: Court-Martial jurisdiction over civilian dependents and employees overseas.

Ref: (a) JAG msg 152054Z of Nov. 1956.
Encl: (1) Navy population figures for Spain; (2) Copy of Procedural Agreement No. 16 to the 26 September 1953 Agreements between the United States and Spain [not printed].

1. The Judge Advocate General, by reference (a), has requested the views of this command: (a) as to various aspects of problems related to court-martial jurisdiction over civilian dependents and employees overseas, hereinafter set forth; and (b) as to the impact on its military mission if jurisdiction to try dependents and other civilians under Article 2 (11), UCMJ, should be held unconstitutional by the United States Supreme Court. Article 2 (11) covers under the Code, subject to treaty agreements and international law, "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and certain territories.

2. Procedural Agreement No. 16, executed by and between the United States and Spain on 4 February 1955 (reference (b)), similarly defines the term "Members of the United States Forces" as having "reference to military personnel of the United States Armed Forces, the technicians and personnel accompanying, serving with or employed by said forces who are subject to the military laws of the United States and members of the families of the aforementioned individuals". Current population figures for personnel of the foregoing categories who are under United States Naval jurisdiction in Spain are set forth in enclosure (1). In addition, the Procedural Agreement will apply as well to the increase in personnel contemplated for activation of the U. S. Naval Activities at Rota, Cartagena, and El Ferrol. To avoid classification of this letter, the population esti-

mates for these activities are not set forth herein, but may be obtained from the Chief of Naval Operations.

3. The Procedural Agreement also applies, of course, to personnel under the jurisdiction of the Army and Air Force, and is considered to be quite favorable to the United States. It contains the following salient provisions:

a. Primary and exclusive jurisdiction is granted to the United States for the trial or other disposition of all offenses, whether against United States or Spanish law, committed by "members of the United States Forces", *provided* such offenses are "punishable under the Uniform Code of Military Justice". The offender is thereafter immune from Spanish prosecution.

b. Spanish authorities may prosecute a "member of the United States Forces" in Spanish courts only if the Chief, Joint United States Military Group accedes to a request therefor and executes a waiver of jurisdiction. Such waiver might be appropriate in the case of an offense committed by a member of the United States Forces jointly with a Spanish National who would not be subject to trial by United States authority.

c. Custody of a member of the United States Forces, who may be prosecuted by Spanish authorities, because of waiver of United States jurisdiction or because the offense charged is not punishable under the Uniform Code of Military Justice, shall remain with the United States authorities until such time as the trial is concluded and the sentence pronounced, and the United States authorities shall accept the responsibility of assuring the presence of the offender at the time of trial.

d. A member of the United States Forces who may be prosecuted by Spanish authorities shall be entitled

to the same rights and privileges as those enjoyed by Spanish citizens and (1) to be protected against Ex Post Facto laws, Bills of Attainder, and the use of a confession obtained by illegal or improper means; (2) to be informed, in advance of trial, of the specific charges against him; (3) to have a prompt, speedy and public trial before an impartial court, with a representative of the United States Forces present; (4) to be present at his trial, be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor; (5) to have counsel of his own choice or free legal counsel furnished on conditions applicable to Spanish citizens; and (6) to have the services of a competent interpreter.

4. In the paragraphs following are set forth the views of this command upon the specific points raised by reference (a).

5. *The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas.*

a. *Language Barrier.*—It must be recognized at the outset, and borne in mind during consideration of the entire problem, that the great majority of the "members of the United States Forces", both military and civilian, speak little or no Spanish. They cannot, therefore, deal with Spanish officials as they would with local officials back home.

b. *Spanish Government Expectations.*—Because of the large number of "members of the United States Forces" present and contemplated to be present in Spain, and especially in view of the language barrier, it is natural for the Spanish Government to expect the United States to keep its own house in order.

The Procedural Agreement discussed above so provides and contemplates that offenses not punishable by the United States will be punished by the Spanish government.

c. *Internal Administration.*—The United States Forces provide considerable support for their personnel, military and civilian, and their dependents, the administration of which is a matter of internal management and must be accomplished by United States rules and regulations. Included in such support are Post Exchange and Commissary facilities, medical and dental care, issuance of coupons entitling the purchaser to exemption from Spanish gasoline taxes, reimbursement of rental expenditures by government employees, obtaining of Spanish auto and driver's licenses and identification cards, clearance of personal and household effects through Spanish customs, etc. Violations must be punishable if such rules and regulations are to be effective and the support continued.

6. *The "practical" alternatives to the exercise of jurisdiction by court-martial.*—Various alternatives exist, none of which are considered practical, for the reasons set forth below:

a. *Exercise of jurisdiction by Spanish Courts.*—The Procedural Agreement described above clearly contemplates that the Spanish authorities may and will prosecute in the Spanish courts offenses which are not punishable under the Uniform Code of Military Justice. Denial of United States court-martial jurisdiction over dependents and other civilians would automatically confer jurisdiction upon the Spanish Courts as to all such persons. This would be highly objectionable from the American point of view because of the following considerations:

(1) ***Disadvantage to the Accused.***—Differing procedures of the Spanish Courts, complicated by the

language barrier noted above, would make it difficult for the average American to assist in his own defense, even though he be provided with an interpreter. The rights to be present at his own trial, to be confronted with the prosecution witnesses, and to be represented by counsel, lose much of their value when the accused, himself, can follow neither the proceedings nor the testimony, and cannot converse with his own lawyer. Differing concepts as to the seriousness of a particular offense may also operate to the disadvantage of the accused. In addition, Spanish standards for places of confinement and concepts of punishment are different from our own.

(2) *Administrative Difficulties.*—Exercise of jurisdiction by Spanish Courts in the cases of all dependents and other civilians would impose a considerable administrative burden upon United States authorities who would, under the Procedural Agreement, be required to assume custody and insure the presence for trial of each offender pending the outcome in the Spanish Courts and would also be required to keep a representative on call for each case as it came to trial. Despite the guaranty in the Agreement of a speedy trial, common experience indicates that considerable delay may be anticipated in such cases. During periods of delay, it might well become necessary to withhold transfer of military personnel pending release of their dependents by the Spanish Courts. Also, in the case of civilian employees, it might easily become necessary to extend periods of employment, pending outcome of trial of themselves or their dependents, as an alternative to casting them off in an alien land. Of paramount concern, however, would be the necessity to report to and request prosecution by the Spanish Authorities of offenses relating peculiarly to the internal administration of the

military forces, i. e., abuse of Army Post office, Post Exchange and Commissary privileges, frauds or embezzlement of United States funds. Moreover, some of these offenses would not constitute violations of Spanish law and so could not be prosecuted.

(3) *Burden on Spanish Government and loss of prestige of the United States.*—As noted above, the Spanish Government expects the United States Forces to police themselves and would undertake the police responsibility only with reluctance. Requesting them to do so on the ground that United States military courts lacked jurisdiction would result in considerable loss of prestige on our part. This is particularly true in a country, such as Spain, where their courts-martial have exclusive jurisdiction over members of the military forces, even as to offenses against the civil law, and also have jurisdiction over civilians who commit offenses against the military establishment. Upon activation of the Spanish bases, the lack of United States court-martial jurisdiction could be expected to result in trial by Spanish court-martial of United States dependents and other civilians.

b. *Exercise of jurisdiction by United States Civil Courts.*—No such jurisdiction now exists and could be exercised only after appropriate enabling legislation and agreement with the Spanish Government. The exercise of jurisdiction by United States Civil Courts as to offenses committed in Spain would be manifestly impractical. Such courts could not readily sit in the United States since all the witnesses, real evidence, and complaining parties would be located in Spain. If such courts were to sit in Spain, such considerations as the selection and empanelling of juries and the employment of civilian counsel would pose very serious problems. Furthermore, the operation

of military and civil courts, side by side, would cause a lack of uniformity in the administration of discipline and justice among personnel of the United States Forces in Spain. Since the extent of jurisdiction to be exercised by the civil courts would rest upon agreement with the host country, further lack of uniformity would appear from country to country where our forces are present. The exercise of jurisdiction by our military courts has been accepted by the Spanish Government as a natural concomitant to the presence in Spain of our military forces. It is not to be expected, however, that the Spanish Government would willingly accept the establishment of the United States Civil Courts within its borders nor the transfer of all offenders to the United States for trial.

c. *Exercise of only administrative jurisdiction.* This would amount, in most cases, only to the withholding of privileges or the transfer from Spain of an offending dependent and or the discharge of an offending employee. Such action would not be sufficient, in many cases, and, in others, would not satisfy the Spanish authorities.

7. *The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the Armed Forces and civilian dependents.*—No distinction is made in the Uniform Code of Military Justice and none is made in the Procedural Agreement.

8. *The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses.*—No distinction is made in the Uniform Code of Military Justice and none is made in the Procedural Agreement.

9. *Impact on military mission if jurisdiction to try dependents and other civilians under Article 2 (11) should be held unconstitutional by court.*—The military mission of the United States Forces in Spain would be very seriously impeded by the loss of court-martial jurisdiction over dependents and other civilians, for the reasons stated above. In summary, it is apparent that such jurisdiction is absolutely essential to the government and regulation of our forces in order to preserve the favorable Procedural Agreement with the Spanish Government and because of (a) the Language Barrier, (b) the expectations of the Spanish Government that we will police ourselves, and (c) the numerous matters which require internal administration, regulation and enforcement and which are of no concern to the host government. It is equally apparent that there are no *practical* alternatives to the exercise of such jurisdiction. Denial of court-martial jurisdiction would immediately throw an unwanted and unwarranted burden on the host government and would probably require the negotiation of new agreements. It would also result in the loss of considerable prestige now enjoyed by our Government and its citizens in Spain, and would greatly impair the recruiting of civilian personnel for employment in Spain. The great majority of our civilian personnel would be most reluctant to give up the guaranties and protections now enjoyed by them before United States courts-martial in return for exposure to trial by a strange court in an alien land with strange proceedings in an alien tongue.

10. It will be noted from enclosure (1) that the major portion of the United States personnel under naval cognizance in Spain are under the jurisdiction of the Officer-in-Charge of Construction, Bureau of Yards and Docks Contracts, Spain. The prepara-

tion of this letter has, accordingly, been coordinated with that activity and the comments herein contained reflect the past experience of that activity in such matters.

J. P. Walker,
JJ. P. WALKER.

Copy to: (less encl. (2)):
ASSTCHJUSMGNAV
CINCNELM
OICC, BUDOCKS CONTRACTS, SPAIN

[Enclosure]

POPULATION AS OF CITIZENS UNITED STATES FORCES NAVY IN SPAIN

Activity	Navy members	Navy dependents	Civil service members and dependents	Prime contractor employees and dependents	Subcontractor employees and dependents
COMNAVACTS SPAIN	55	90	5		
OICC, BUDOCKS CONTRACTS, SPAIN	57	83	286	1,706	302
Other	26	38	26		
Totals	118	211	317	1,706	302

APPENDIX B

An indication of the type of offenses involved in the summary and special court-martial cases of civilians may be gained from the experience in Iceland, for which we have data available. The only civilians who have thus far been tried by court-martial in that area have been male employees. The charges and disposition have been as follows:

Summary court martial

Dec. 4, 1952—employee—attempted customs violation—fined $25.

Dec. 29, 1952—employee—attempt to sell liquor to enlisted men—fined $25.

Dec. 29, 1952—contractor employee—selling whiskey to enlisted men—fined $25.

March 13, 1953—post exchange employee—attempt to take whiskey off-base—fined $50.

March 31, 1953—employee—disorderly in Hotel De-Gink—fined $100.

July 22, 1953—employee—possessed $700 in U. S. currency—fined $300.

July 22, 1953—employee—signed false certificate to convert military payment certificates to U. S. currency—fined $300.

July 22, 1953—employee—possessed $100 in U. S. currency—fined $300.

July 23, 1953—contractor employee—possessed $200 in U. S. currency—fined $300.

Aug. 17, 1953—employee—possessed $100 in U. S. currency—fined $300.

Feb. 4, 1954—employee—fail to remain on base; violate Reykjavik curfew—confined at hard labor 20 days.

Jan. 25, 1955—contractor employee—wrongfully appropriate tire and wheel belonging to the United States—fined $25.

April 5, 1955—contractor employee—drunk and disorderly—fined $25.

Oct. 31, 1955—employee—selling gin—fined $200.

Nov. 10, 1955—employee—remove whiskey from base—fined $200.

Nov. 16, 1955—contractor employee—put lewd films in mails—fined $300.

Dec. 8, 1955—contractor employee—sell whiskey to enlisted men—fined $150.

Dec. 8, 1955—contractor employee—sell whiskey to enlisted men—fined $100.

April 30, 1956—contractor employee—drunk and disorderly in station—fined $25.

Special Court Martial

Jan., 1953—employee—refused to obey orders (quit job and fled to United States prior to trial).

June 14, 1954—contractor employee—assault with intent to commit grevious bodily harm—fined $250 and confined at hard labor for two months.

General Court Martial

July 22, 1953—contractor employee—three specifications assault and one specification sodomy—fined $750 and confinement at hard labor for three months (confinement at hard labor remitted).

APPENDIX C

The United Kingdom's Army Act, 1955 (3 & 4 Eliz. 2, Ch. 18) is analogous to the Uniform Code of Military Justice. The section specifying the civilians who should be subject to its terms in peacetime[1] is the Fifth Schedule, which is reprinted below.

Fifth Schedule

Civilians outside the United Kingdom subject to Part II when not on active service

1. Persons serving Her Majesty, or otherwise employed, in such capacities connected with Her Majesty's naval, military or air forces as may be specified for the purposes of this Schedule by regulations of the Army Council, being persons serving or employed under Her Majesty's Government in the United Kingdom.

2. Persons who are employed by, or in the service of, any naval, military or air-force organisation so specified to which Her Majesty's Government in the United Kingdom is a party and are employed by or in the service of that organisation by reason of that Government being a party thereto.

3. Persons belonging to or employed by any other organisation so specified which operates in connection with Her Majesty's naval, military or air forces.

4. Persons who, for the purposes of their profession or employment, are attached to or

[1] The term "not on active service" used in the heading of the text means, in effect, during time of peace in areas where no emergency has been declared. See Sec. 224 of the Army Act, 1955.

accompany any of Her Majesty's naval, military or air forces in pursuance of an authorisation granted by or on behalf of the Admiralty, the Army Council or the Air Council.

5. Persons forming part of the family of members of any of Her Majesty's naval, military or air forces and residing with them or about to reside or departing after residing with them.

6. Persons forming part of the family of persons falling within paragraphs 1 to 4 of this Schedule and residing with them or about to reside or departing after residing with them.

7. Persons employed by members of any of Her Majesty's naval, military or air forces.

8. Persons employed by persons falling within paragraphs 1 to 6 of this Schedule.

9. Persons forming part of the family of persons falling within either of the last two foregoing paragraphs and residing with them or about to reside or departing after residing with them.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 701—OCTOBER TERM, 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 713—OCTOBER TERM, 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR APPELLANT AND PETITIONER ON REHEARING

I

DEFENDANTS FAIL TO MEET THE SOUND LEGAL BASIS FOR THE COURT'S DECISION OF JUNE 1956 THAT THE TRIALS HERE INVOLVED HAVE A VALID CONSTITUTIONAL FOUNDATION, APART FROM THE POWER OF CONGRESS TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES

As we have stressed throughout the litigation in this Court, the government believes that the jurisdiction of the tribunals which tried the defendants can be sustained on two independent, although interrelated, constitutional grounds. Defendants' brief, in attacking the basis of the Court's decision last June, argues that the United States can exercise no court-martial jurisdiction over military dependants overseas unless it be contained within the power conferred on Congress by clause 14, section 8, Article I. Before turning to the broad scope of that power as understood at the time the Constitution was adopted and as strengthened by the necessary and proper clause (see Point II, *infra*, pp. 23–61), we would like first to answer, once again, defendants' erroneous attack on the reasoning of the Court's prior decision in these cases. We have already set forth our understanding of the Court's opinion—in our Memorandum in Reply to the Petition for Rehearing (filed in October 1956) as well as at the beginning of our Supplemental Brief on Rehearing (pp. 1–7)—and we respectfully refer the Court to those documents for summary statements which seem to us to show the core of defendants' misapprehension of the opinion. In this brief, we

shall give a somewhat more detailed explanation of the basis of the Court's ruling and of defendants' misunderstandings, as we view them.

The heart of defendants' error is this: Whether a military court is an appropriate one for trying a serviceman's wife overseas—whether it accords due process under all the circumstances—are questions of judgment on which there may be differences of views; but that the United States is without the constitutional power to adjudicate *overseas* the guilt or innocence of an American citizen *committing an offense abroad* is a proposition that must be rejected. But that is the nub of defendants' argument, since they insist on a trial similar to that available to a federal defendant in this country although it is plain that a jury and a grand jury cannot be assembled in a foreign land, nor trial had there in an Article III court. Defendants' entire brief rests on the wholly incorrect assumption that a person accompanying the armed forces into foreign territory, where the United States is not sovereign, is in exactly the same position, constitutionally and practically, as a person accompanying the armed forces within the United States where this nation is wholly sovereign.

A. THE POWER OF THE UNITED STATES TO CONDUCT A TRIAL WITHIN A FOREIGN COUNTRY DERIVES FROM THE SOVEREIGN POWER OF THE UNITED STATES IN ITS DEALINGS WITH OTHER SOVEREIGN COUNTRIES WITH RESPECT TO CONDUCT WITHIN THEIR TERRITORY

Defendants argue at length that the United States was not here exercising powers received by delegation from the governments of Japan and Great Britain (Point I of Defendants' Supp. Br.). We agree, of

course. We have never contended that the United States was exercising powers delegated to it by another government. The powers it is exercising are its own, but the United States cannot exercise its powers without the consent, express or implied, of the foreign government. Nevertheless, the fact that another nation is directly concerned, and also has jurisdiction, has a primary bearing on the scope and context of the powers of the United States.[1] That the United States is not sovereign in the regions where Article 2 (11) applies is a central fact in supporting the constitutionality of that provision. The power of the United States cannot operate in those territories except under the terms upon which it can obtain consent from the foreign country.

In this connection, it is helpful to distinguish between the power which the United States has to do things abroad and the restraints which may be imposed on that power by provisions of the Constitution. There are two facets of the problem. The first is whether the United States has the power to engage in certain categories of conduct abroad, here to engage in the adjudication abroad of the guilt or innocence of certain citizens alleged to have committed offenses abroad. The second issue is whether the Constitution requires that such conduct be done in a certain way, here that these individuals be indicted by a grand jury

[1] In a comparable context, the Court held that "emergency does not create power" but it may "furnish the occasion for the exercise of power." *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425–426.

and tried by a jury before a judge with life-time tenure or, at least, not be tried by court martial.

There surely can be no doubt at this stage in our history of the general power of the United States to regulate the conduct of Americans abroad, to define offenses, and, if the the territorial sovereign consents, to try Americans abroad for such offenses. There is, of course, no provision of the Constitution which says so expressly; but, although the Constitution contains no clause which states specifically that the United States shall have all the sovereign powers of a nation *vis-à-vis* other sovereign nations, it is settled that this is so. See, *e. g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *United States* v. *Pink*, 315 U. S. 203; *Hines* v. *Davidowitz*, 312 U. S. 52; *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103. See also the discussion in the Brief for the United States (pp. 32–35) in *United States* v. *Guy W. Capps, Inc.*, Oct. Term 1954, No. 14.

The concept of the Federal Government as one of specifically delegated powers—to be found in Article I, section 8—applies in the field of internal affairs but not in the area of foreign affairs. See *United States* v. *Curtiss-Wright Corp.*, *supra*, at 315–318;

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[2] In the *Curtiss-Wright* case, the Court pointed out (299 U. S. at 318):

"* * * The power to acquire territory by discovery and occupation (*Jones* v. *United States*, 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 *et seq.*), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co.* v. *United States*, 224 U. S. 583, 600–601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note

United States v. *Pink*, *supra*, at 242 (Frankfurter J., concurring); and see *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, concurring opinions of Justices Frankfurter and Jackson, at 610, and 635–636, fn. 2). As between the citizens and States on one hand and the Federal government on the other, rights not given to the Federal government are reserved to the people and to the States. But as between the United States and other sovereign countries the United States has assumed "among the powers of the earth, the separate and equal station" referred to in the Declaration of Independence, with full power to do all "Acts and Things which Independent States may of right do." "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." *Burnet* v. *Brooks*, 288 U. S. 378, 396.

Inherent in the powers of a sovereign nation is the general capacity to exercise jurisdiction in foreign territory. Clearly, the United States could, if agreeable to the other governments concerned, adjudicate a dispute among nations, or decide a controversy as to ownership of foreign territory, or arbitrate a dispute between individuals. There is no less power—to be exercised if the territorial sovereign consents—to decide controversies among its own citizens abroad, or to exercise criminal jurisdiction abroad over its own nationals who have committed offenses there. The

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1), *none of which is expressly affirmed by the Constitution*, nevertheless exist as inherently inseparable from the conception of nationality." [Emphasis added.]

long history of the exercise of jurisdiction over Americans by American tribunals overseas is warrant enough, in 1957, for accepting the existence of such a general power in the Federal Government. *E. g., In re Ross*, 140 U. S. 453; *Neely* v. *Henkel*, 180 U. S. 109; *Madsen* v. *Kinsella*, 343 U. S. 341; and see the Government brief on the original argument in No. 701, pp. 61–65; Government reply brief on the original argument, pp. 28–30.

In short, the United States undoubtedly has general power, as a fully sovereign nation, to try Americans abroad for their overseas conduct. We turn, then, to the more valid question of whether such trials must be governed by the requirements of Article III and the Fifth and Sixth Amendments.

B. A UNITED STATES TRIAL WITHIN A FOREIGN COUNTRY FOR AN OFFENSE COMMITTED THERE IS NOT GOVERNED BY THE JURY, GRAND JURY, AND LIFE-TENURE REQUIREMENTS OF ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS

1. Only some of the specific provisions of the Constitution are applicable abroad and the requirements of an Article III court and jury trial do not so apply

Defendants appear to argue that every provision of the Constitution is applicable throughout the world, and that the same restraints apply to the United States abroad, where it must adjust its conduct to meet the circumstances that there exist and the views of other governments, as apply in the United States. We submit that (as the Court has already held, *e. g., Dorr* v. *United States*, 195 U. S. 138, 142–3, 148) this is clearly not so.

The provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without due process of law is a broad but flexible restraint upon the power of the United States. It is adaptable to changing circumstances and conditions. The process of law that may be due under one set of circumstances may not be required under other circumstances and may not be adequate under still others. So far as Americans are concerned, this provision is binding upon the United States wherever it exercises its sovereign powers precisely because it "is not a technical conception with a fixed content unrelated to time, place and circumstances", but is rather "a delicate process of adjustment" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162–163 (Frankfurter J., concurring)). By its very nature the Due Process Clause cannot unduly interfere with the exercise of powers by the United States in the international field, or impose an undue restraint upon it.

There are, on the other hand, constitutional provisions which do not automatically apply outside of the United States. The grand and petit jury clauses, as well as the requirement of an Article III court, historically fall into this class, as this Court has consistently held for many years. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Balzac* v. *Porto Rico*, 258 U. S. 298; *In re Ross*, 140 U. S. 453; cf. *Neely* v. *Henkel*, 180 U. S. 109. As recently as the 1951 Term, in *Madsen* v. *Kinsella*, 343

U. S. 341, dealing with American military government courts in Germany after World War II, the Court recognized that neither Article III nor the jury provisions of the Fifth and Sixth Amendments applied to the trial of an American civilian on foreign soil.

Although the Court made clear that it was holding unequivocally that the jury and Article III provisions do not apply, of their own force, to the overseas possessions (see *e.g.*, 258 U. S. at 304–5), defendants endeavor to distinguish the first three of these cases—those arising in the territories—on two special grounds. First, that the trials were before tribunals which were in existence before the territory or possession passed under American sovereignty, and secondly that neither the grand jury or petit jury had formed part of the possession's ancient institutions. Neither distinction helps defendants; rather, each goes to prove that the constitutional provisions for a grand and petit jury do not automatically apply outside the United States, but that one must look to the particular circumstances to see what procedure would be reasonable under the circumstances for a trial in that area, *i. e.*, what would be "due process." In those cases the Court did look to the particular circumstances in applying the due process test. Defendants themselves agree that "There was every reason to hold that the Constitution did not, *ex proprio vigore* and without Congressional action * * *" (Def. Supp. Br., p. 94) require in Hawaii a system of grand juries and unanimous ver-

dicts of petit juries.[3] In short, it is settled by these overseas-possessions cases that the provisions of Article III and the jury clauses of the Fifth and Sixth Amendments do not apply outside the United States.[4]

In re Ross is also a clear holding that the requirements of Article III and the jury provisions of the Fifth and Sixth Amendments do not automatically apply where the United States conducts a trial outside of the United States and within the territory of a foreign government. We have already discussed the *Ross* case, and its implications, in some detail. See the Government's original brief in No. 701 at pp. 61, *et seq.*; Government Reply Brief on original argument, pp. 28–30; Government's Memorandum in Reply to Petition for Rehearing; and Government's Supplemental Brief on Rehearing, pp. 3–4, 81, 90–91. However, in view of the defendants' curious treatment

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[3] It may be well to point out that the defendants, in supporting the reasonableness of the holding that juries were not required in Hawaii and the Philippines, have considered the ability of the United States to conduct a trial, *in those islands*, with grand jury, petit jury, and life-tenure judge. The fact that it would have been physically possible to bring an Hawaiian to the United States and accord him a jury trial on the mainland was not taken into account, and it is quite significant that defendants do not suggest that it should have been. Nevertheless, defendants insist that that must be done in cases like the present.

[4] It was common ground, in these "territorial" cases, that if the overseas possessions did *not* form part of the United States—*i. e.*, if they were foreign territory—the jury provisions of the Constitution did not apply. The controversy centered on the issue of whether these possessions had become sufficiently integrated into the United States to require the use of grand and petit juries. The decisions are, therefore, *a fortiori* authority for American tribunals on completely foreign soil.

of that decision (Def. Supp. Br., pp. 63 *et seq.*), *Ross* requires renewed consideration.

2. *Under the defendants' own theory of the Ross decision, their cases were impliedly excepted from the constitutional guaranty of a jury trial and an Article III tribunal*

Although defendants disavow the concession which the Court understood them to have made during the first argument that they could validly have been tried by a consular court, they do not even now contend that the decision in *In re Ross* was wrong. They argue, however, that the power of the United States to try an American abroad without a jury has somehow faded away with the passing of the consular courts, and that in any case the principles of *Ross* must be confined strictly to consular tribunals in the strict sense.

We emphasize that both the government and the defendants start from the proposition that at the time the Constitution was adopted (and thereafter) American citizens could be tried abroad by the United States without a jury trial. Defendants say on this point:

> It is therefore plain that the consular jurisdiction is a pre-constitutional jurisdiction, established under the Articles of Confederation, and that, prior to 1789, American citizens abroad in countries granting a general extraterritoriality to the United States did not have a right to trial by jury before an American consul. [Def. Supp. Br., p. 70]
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> * * * * *

> All such individuals subject to non-jury trials when the Constitution was adopted were impliedly excepted from the Sixth Amendment's guarantees. [Def. Supp. Br., p. 90]

This so-called "pre-constitutional" exception defendants seek to limit (a) to trials within countries in which the United States had complete extraterritoriality and (b) to trials by a consul. There is neither logic nor authority for such a limitation.

(*a*). Certainly, the extent of the extraterritorial rights acquired by the United States from a foreign government—whether complete extraterritoriality or a lesser right—cannot be the justification for an overseas trial without a jury. Defendants are here arguing the exact opposite of the position urged at the outset of their supplemental brief, *i. e.*, that a foreign government cannot give the United States rights to try an American without a jury which it would otherwise not have. In the 19th century the United States had full extraterritoriality in many countries. Now, it has limited rights by virtue of the various status of forces agreements. But the applicability of Article III and the jury provisions of the Constitution cannot depend upon that general change in our relations with the nations of the world. If the right of the United States to try an American without a jury cannot be augmented by a granting of rights from a foreign government, it cannot be reduced by limitations on the "extraterritorial" rights allowed by that government.

In fact, exactly the opposite conclusion should be reached. At the time of *In re Ross*, the United States

had much greater freedom of action than it does now with respect to many countries such as Japan, China, Siam, and areas in Africa. It could have taken Ross to the United States for trial, freely and without question. Now, because of the abolition of the old extraterritorial rights, and the change in international relationships, the United States is far less free to do as it pleases, and must negotiate with other sovereign governments for terms acceptable to them. The United States cannot remove persons such as the defendants without the permission of the local government, and if it is to try them abroad it must do so in the kind of tribunal which that government is willing to have sit within its country. In sum, there is absolutely no reason to limit the principle of *In re Ross* to countries in which the United States had "complete extraterritorial rights" or "general extraterritoriality". The only requirement is that the United States be given enough rights so that it may try its citizens abroad with due process. It cannot be the law that the greater the rights which the United States is given by the foreign sovereign the fewer the rights it must give its own citizens.

(*b*). The second limitation which defendants seek to place on *In re Ross* is that it is restricted to trials by a consul because that particular mode of overseas trial was recognized before 1789 and therefore excepted from the jury and Article III requirements of the Constitution. (Def. Supp. Br., p. 70). But what was impliedly excepted from the constitutional provisions was not the exact form of the then overseas trial, frozen rigidly as it was in 1789—the precise type of

consular court with its then procedure practice, and operations—but rather the general concept, recognized under the Confederation, that by arrangement with foreign governments Americans might be tried abroad (for crimes committed abroad) by appropriate American tribunals which do not have to meet the requirements of Article III and the jury provisions. Surely, the United States was not saddled by the Constitution with the minimal standards of the consular court as it was known in 1789, and left without constitutional power to improve or modify that system of overseas tribunals. If it is constitutional for the United States to try a man in a foreign country without a jury before a consul, it must be constitutional to try him without a jury before a tribunal which affords him greater protection. See the government's reply brief on the original argument, pp. 28–30.* Under defendant's own theory, therefore, they are in no position to claim the protection of Article III and the jury requirements.

(*c*). Defendants throughout their supplemental brief on rehearing argue that what is here involved is an "extension" of court-martial jurisdiction which "would contract their right to jury trial as it existed at and before adoption of the Constitution" (p. 101; see also, *e. g.*, p. 51). Even apart from the

* The difference between the *Ross* type of consular court and the present protections afforded the accused in the court-martial system are suggested at the cited pages of our reply brief on the original argument. Defendants' Supplemental Brief on Rehearing gives further examples of consular court practice which compare very unfavorably with court-martial protections.

pre-constitutional use of courts-martial for service wives (see Point II, *infra*), the defendants' own discussion of *Ross* shows, as we have just pointed out, that this argument is fallacious. When the Constitution was adopted, Americans committing crimes abroad were *not* entitled to a jury trial if they were tried abroad. There is no historical evidence to the contrary. It follows that such a trial by a tribunal which does not employ a jury cannot be a "contraction of the right to trial by jury" (Def. Supp. Br., p. 51).*

(*d*): There is no warrant at this time for upsetting the almost seventy years of the Court's decisions (see *supra*, pp. 7–10) holding that the constitutional provisions for juries and Article III courts do not apply to American trials overseas—and defendants do not

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* Defendants purport to find an irreconcilable conflict between *Toth* v. *Quarles*, 350 U. S. 11, and the Court's decision of last June. Both the Court and our previous briefs have pointed out the controlling distinctions—particularly, the fact that Toth was a civilian *in the United States* when taken into custody, and therefore privileged under the Constitution to a jury trial by an Article III court. See 351 U. S. at 474, 476; our brief in No. 701 on the original hearing, at pp. 45–6, 71–2; and our reply brief on the original argument, at pp. 19, 24.

Mainly for this reason—that Toth's trial by court-martial would actually be a "contraction of the right to trial by jury" while the defendants' trial was not—the *Toth* case is wholly different from these cases. The Government did not attempt to support its position in *Toth* on the ground that he had been taken out of the United States after his arrest—the fact which defendants cite as making that case the analogue of these (Def. Supp. Br., p. 134)—and it is not difficult to imagine what short shrift the Court would have given to an argument that military jurisdiction which was invalid in this country could have been obtained by forcible removal of the ex-serviceman from the country.

explicitly ask that this be done. Apart from the historical and theoretical difficulties of now adopting the contrary principle, there are the practical problems which loom large in this day of the equality of nations, even larger than in the era of capitulations when the more powerful could perhaps coerce the weaker states. Today we cannot impose our own will, and if the constitutional requirements are such that they cannot be met or are unacceptable to the foreign government, the result may well be that no American trial can be held at all.

Throughout our Supplemental Brief on Rehearing (particularly in Points I and II), we have tried to set out the factors which move, and are likely to move, the countries in which our forces are located:—*e. g.*, the concern for an on-the-spot trial in many cases of violation of local law; the unlikelihood that American civilian courts and juries would be permitted to sit abroad; the unwillingness to permit removal to this country of American committing offenses which are also local crimes. We have also touched upon the difficulties, from the purely American point of view, of removal to this country and trial in a federal court here. See also, for further discussion, Point III, *infra*, pp. 61–81. The insuperable problems inherent in having grand and petit juries, composed of Americans, sitting in foreign territory are so plain as to need no elaboration.[*]

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[*] Defendants do not suggest that the United States could assemble a grand jury and a petit jury overseas. It is patent that any such jury, whether gathered from American servicemen, tourists, dependents or employees, or of foreign nationals who volunteered, would not meet the standards required for impartial jury selection.

As we point out in our Supplemental Brief on Rehearing, the probable result of the interplay of these multiple factors would be that, if the Article III and jury provisions are made applicable to overseas crimes, there could be no American trial at all. There would either be a trial by the foreign government, or no trial. But Congress has clearly indicated its wish that Americans like these defendants be tried by an American tribunal. See our Supplemental Brief, pp. 55–57, and our Reply Brief on the original agreement, pp. 17–18, 22. It seems to us unreasonable, as well as anti-historical, to hold now that this wish cannot be fulfilled—that the United States, unlike all other countries, has so severely incapacitated itself to deal with practical situations outside its borders.[7]

C. CONGRESS MAY APPROPRIATELY USE A MILITARY TRIBUNAL TO EXERCISE THE JURISDICTION WHICH IT IS ALLOWED BY FOREIGN COUNTRIES TO EXERCISE OVER MILITARY DEPENDENTS AND EMPLOYEES ABROAD

1. The distillation of our discussion in parts A and B of this Point (as well as, we believe, of the Court's opinion of last June) is that there is implied in the full power with which the United States, as a sovereign, is vested in order to maintain an effective control of foreign affairs the specific authority to regulate the conduct of Americans abroad, to provide for

[7] Another illustration may be useful. At the present time there are in the antarctic some 125 civilians who are part of the United States expedition which is a part of the International Geophysical Year project in which various countries are cooperating to obtain fundamental research data about the nature of the earth's atmosphere. The United States must certainly have the constitutional power to provide for punishment there of one of these men, irrespective of his military status, should he commit a crime, provided it does so with due process of the law.

them, a criminal code, and to establish *appropriate tribunals* abroad for the trial of offenses.[7] The requirements of Article III and the jury provisions of the Fifth and Sixth Amendments do not apply, but the Due Process Clause would govern, just as it governs all other Congressional powers.[8]

The issue thus narrows to whether a court-martial is such an appropriate tribunal for this class of case, and whether Article 2 (11) of the Uniform Code is a reasonable exercise of power in these circumstances. That was the test applied in the Court's opinion of June 1956. We have shown in our Supplemental Brief on Rehearing that the Court's conclusion was fully justified. See, *infra*, pp. 23–81, for further discussion of historical and practical considerations, and also our reply brief on the original argument, pp. 2–22, 29–30. We do not repeat these arguments at this point, but it is well, once again, summarily to lay the ghost of procedural unfairness in military trials. The Uniform Code of Military Justice provides in high degree procedural safeguards for an accused. In many ways its level is higher than the standards required of the States by the Fourteenth Amendment. (In this connection it should be recalled that under the federal system murder, as well as most of the crimes with

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[7] The Necessary and Proper Clause applies, of course, to the foreign affairs powers of Congress as well as its others.

[8] Defendants erroneously maintain (Def. Supp. Br., pp. 116 *et seq.*) that "the military considerations adduced are relevant only to the Clause 14 power." On the contrary, these considerations are directly pertinent in determining whether courts-martial are *appropriate* tribunals for trying these service wives—wholly apart from clause 14. The situation of "non-military" civilians abroad—*e. g.*, tourists—might well be different (see 351 U. S. at 480, and our Memorandum in Reply to the Petition for Rehearing, p. 8).

which we are here concerned, is a crime that is almost invariably tried in State courts.) There is no question but that the Uniform Code provides for a fair trial.[9] See our reply brief on the original argument, p. 30.

2. Defendants argue, however, that Congress is precluded from utilizing the court-martial system for their trial overseas because that system is basically established under Article I, section 8, clause 14 of the Constitution which does not cover the defendants, of its own force. Assuming for this part of our argument that clause 14, in itself, would not authorize the defendants' court-martial (but see Point II, *infra*, pp. 23–61), their contention is nevertheless unsound. Where appropriate, Congress may use a tribunal created under one constitutional power to exercise authority granted under another. In other instances Congress has adopted a statute under one grant of power and made it applicable to conditions resting on a different constitutional authority.

For example, the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 902—which rests on the Commerce Clause—was made applicable by a simple summary reference to general employment within the District of Columbia—which Congress governs under clause 17 of section 8 of Article I

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[9] Defendants' concern over the Code's lack of protection against excessive bail (Def. Supp. Br., p. 95) is not well founded. In those cases where bail would normally be allowed by a civil court, military authorities, having other sanctions and needing no bond, normally allow the accused at least the freedom of the base on his own recognizances. In cases involving murder, such as those here, bail is not usually allowed by any court.

[10] The Act of May 17, 1928, 45 Stat. 600; See *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 471.

of the Constitution." Similarly, the District of Columbia courts exercise powers stemming from Article I as well as Article III powers. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *O'Donoghue* v. *United States*, 289 U. S. 516. The federal district courts also exercise authority, under the Tucker and Tort Claims Acts, in fields in which Congress derives its power solely from Article I. *Williams* v. *United States*, 289 U. S. 553; cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582. The postal savings system, which draws support from the borrowing clause of section 8 and other non-postal powers, has been entrusted to the Post Office Department established under the postal clause of section 8. As these instances prove, there is nothing incongruous or extraordinary in the use by Congress of an instrumentality fundamentally created under one power (here, the court-martial system) as the organ for implementing another power (here, the implied power to regulate the conduct of Americans overseas).

For the same reason, there is no merit to the argument (Def. Supp. Br., pp. 101 *et seq.*) that the provisions of the Uniform Code of Military Justice applicable to defendants' conduct *must* stem from clause

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[11] In comparable fashion, the Longshoremen's and Harbor Workers' Compensation Act was extended to overseas defense bases. Act of August 16, 1941, 55 Stat. 622, 56 Stat. 1035, as amended, 42 U. S. C. 1651; see *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 505. Congress's power in this instance was derived from its power over possessions, the war power, and the foreign affairs power.

14 of section 8.[12] We have shown that, insofar as it relates to individuals covered by Article 2 (11), the Uniform Code can and does derive support from powers other than those granted by clause 14. Congress might have followed the example of the Longshoremen's Act by providing in a separate statute, or at the end of the Uniform Code, that the persons now covered by Article 2 (11) should be deemed subject to the Code; it certainly can make no constitutional difference that Congress chose instead to incorporate Article 2 (11) directly into the Code.

Moreover, it was appropriate for Congress to determine, before it sent its forces overseas, the kind of United States jurisdiction it could represent to the host country it was prepared to exercise, and the implementation of which it was prepared to seek. The basis of negotiation with the territorial sovereign would be the availability of trial under United States law; and Congress has simply determined that the available United States law is as defined in the Uniform Code rather than in a separate system of courts or substantive law.

3. Likewise, there is nothing in clause 14 (or elsewhere in the Constitution) prohibiting Congress from making use of a military tribunal—even though such a tribunal might be otherwise appropriate—to try civilian dependents and employees. Courts-martial are certainly capable of trying civilians and have con-

[12] Defendants say (Def. Supp. Br., p. 102): "Absent the Clause 14 power, no law made criminal the acts for which these women were tried, a feature that plainly differentiates the *Ross* case".

sistently been so used, in proper cases, for centuries. See *infra*, pp. 27, 37, and our original brief in No. 701, pp. 31 *et seq.*; our original brief in No. 713, pp. 38–47, 59–68; our original reply brief, pp. 25–28; our supplemental brief on rehearing, pp. 76–80. And as shown by our supplemental brief on rehearing, pp. 64 *et seq.*, and *infra*, pp. 23–61, there is no indication in the historical materials, or in the experience of the framers of the Constitution, that courts-martial were to be so rigidly limited as to be incapable of appropriate use even where such use was not forbidden by any other provision of the Constitution. In short, there cannot be read into clause 14 an implied prohibition against a Congressional choice of courts-martial as the appropriate tribunal for the trial abroad of service wives like the defendants.

4. Similarly, it is unimportant whether courts-martial are called "legislative" or "executive" courts (Def. Supp. Br., pp. 80–96). The real question is whether, when the United States obtains consent to try its citizens for a local offense on foreign soil, there must be a trial by an Article III court subject to the jury provisions of the Fifth and Sixth Amendments, or whether trial may be by some other form of tribunal which accords due process. So long as Article III and these provisions do not automatically apply—as we have shown (*supra*, pp. 7–10)—the only issue is whether the particular tribunal selected by Congress is an appropriate one. The use of the term "legislative court" is merely a shorthand method of distinguishing such tribunals from Article III courts like

the federal district courts within the United States. Whatever the overseas tribunal be called, the test of its validity is simply its appropriateness and its basic capacity to accord a fair trial in the circumstances.

II

HISTORICAL EVIDENCE DEMONSTRATES THAT ARTICLE I, SECTION 8, CLAUSE 14 OF THE CONSTITUTION UNQUESTIONABLY AUTHORIZED CONGRESS TO MAKE WIVES WHO ACCOMPANY THE ARMED FORCES OVERSEAS SUBJECT TO MILITARY DISCIPLINE AND JURISDICTION

It is agreed that the scope of the power conveyed in clause 14 of section 8 of Article I of the Constitution is *at least* as broad as the contemporary British and American practice at the time of the adoption of the Constitution.[12] Defendants point out that in construing the clause 14 power "we look first to the English Law as it stood at the time of the adoption of the Constitution" (Def. Supp. Br., p. 32), and do not suggest that that power is in any way less than that which was then customarily being exercised by court-martial. In fact, defendants explicitly assume that the "land and naval Forces" should be deemed to encompass those persons covered by the Articles of War then in force (Def. Supp. Br., p. 36). Defendants further state their view that during the period of the adop-

[12] We do not, of course, concede that Congress cannot expand court-martial jurisdiction beyond that known at the time of the adoption of the Constitution, so long as the expansion remains within the general boundaries set by clause 14. See our Supplemental Brief on Rehearing, pp. 64 *et seq.* In the present Point, we urge merely that Article 2 (11) was not an expansion of court-martial jurisdiction as it was known in the 1780's.

tion of the Constitution and the succeeding years the boundary between civil and military jurisdiction in the two countries, Britain and the United States, remained identical (Def. Supp. Br., p. 35), and stress throughout their brief (*e. g.*, pp. 40, 71) that wives like Mrs. Covert and Mrs. Smith could not be tried by court-martial at the time the Constitution was adopted but were undoubtedly entitled to jury trial by a civilian court. In our previous briefs, we have challenged that assumption generally (see our original briefs in No. 701, pp. 32 *et seq.*, and in No. 713, at pp. 40 *et seq.*; our Supplemental Brief on Rehearing, at pp. 76 *et seq.*), but have not fully documented our position. In the light of defendants' consistent and repeated claim, and with the aid of newly-discovered materials, we now proceed to supply further detailed documentation.

The materials uncovered since our prior brief on rehearing was written confirm that there is nothing new and revolutionary in the concept of accompanying civilians, and particularly wives, as bearing an integral relation to the land and naval forces. To the contrary, it appears that in the colonial period and during the war of independence accompanying wives were regarded by both the British and American armies as a necessary part of the armed forces, subject to military order and military discipline. It appears in fact that the concept of retainers to the camp—as persons who have been, from the first, subject at all times to military discipline—included accompanying wives. By granting military jurisdiction over accom-

panying wives only where American civil law does not apply. Article 2 (11) is wholly within the concept of military jurisdiction with which the framers were familiar.

A. DURING THE COLONIAL AND REVOLUTIONARY WAR PERIOD, ACCOMPANYING WIVES WERE REGARDED AS RETAINERS TO THE CAMP

Defendants argue that the Articles of War in effect when the Constitution was adopted were restricted to retainers[14] to the camp and to those serving with the armies in the field and that they therefore "covered only individuals whose duties had some functional connection with the armies". (Def. Supp. Br., p. 40). We need not argue over the phrase "functional connection" provided that the concept is construed as it was then, for the fact is that retainers to the camp included wives and other dependents and that they were considered to have whatever "functional connection" was required to make them subject to court-martial jurisdiction.

1. The dictionary definition of "retainer" current at the time goes far to establish the point. The sole definition of retainer given in Noah Webster's *A Dictionary of the English Language* published in 1807 is "A dependent". Winthrop, however, is even more explicit. He states that the term retainers to

[14] Article 32 of the American Articles of War adopted by the Continental Congress June 30, 1775, spelled the word as "retailers." This is an apparent clerical mistake, since both the British Articles on which it was based and subsequent American Articles from 1806 on spelled the word as retainers. See *Madsen* v. *Kinsella*, 343 U. S. 341, 349, fn. 15. Defendants do not suggest otherwise.

the camp "may be deemed to include:—1. Officers' servants; 2. Camp-followers attending the army but not in the public service." He goes on to state:

> Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. [Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, pp. 98, 99n.]

The term camp-follower, which was encompassed in the concept of retainer to the camp, was at the end of the eighteenth century in no way limited to the modern colloquial usage of a woman of loose morals. The Oxford English Dictionary defined camp-follower as "A man or woman who follows or hangs on to a camp or army, without being in military service", and in fact gives, as an illustration of its use in 1810, an excerpt from a letter by Wellington referring to "The proceedings of the General Court Martial, on the trial of Edward Poole, Camp follower." [15]

2. A study by Walter Hart Blumenthal, entitled *Women Camp Followers of the American Revolution* (1952),[16] reveals that in the colonial period accompanying wives were regarded as a regular part of British armed contingents. He notes (p. 45) that "there was British precedent over here of women with the forces, for a score of years before the Declaration[;] a feminine contingent was conveyed from England

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[15] A New English Dictionary on Historical Principles (1893), vol. 2, p. 55.

[16] In view of the importance which the status of women with the army at the time of the Revolution has to the scope of the constitutional power here involved, nine copies of Mr. Blumenthal's book have been filed with the Clerk for the use of the Court.

with Braddock's command at the outset of the French and Indian War." And further (p. 53):

> British camp women in the Revolution were an established institution. It was the tradition that men-at-arms needed women at arms. Nor did the Revolution end the British tradition. Wellington's army in the Peninsular War (1809–1814) had its share of wives and wenches—forty to sixty in every regimental following, astride donkeys, with scores, nay, hundreds, of Portuguese and Spanish helpmates picked up on the road.

That such accompanying women, including wives, were considered subject to court-martial jurisdiction appears from a letter written by one such wife on June 4, 1758, to Colonel Bouquet from Carlisle jail where her husband was confined for cause and she likewise, for having abused the colonel. In her letter (*id.*, p. 49) she said:

> I have been a Wife 22 years and have traveld with my Husband every Place or Country the Company marcht too and have workt very hard ever since I was in the Army. I hope yr Honour will be so good as to Pardon me this onet time that I may go with my Poor Husband one time more to carry him and my good Officers water in ye Hottest Battle as I have done before. Yr unfortunate Petitioner and Humble Servant, Martha May.

Women were sent over with British troops during the American Revolution, including the early period before the Declaration of Independence when, from the British point of view at least, there was no war, but merely disorder in the colonies. General Sir William Howe's Orderly Book for the period from June

17, 1775 to May 26, 1776, show that the British treated the women as a regular part of the army. Orders were regularly issued to account for the women so that provisions could be issued for them.[17] Their conduct was regulated.[18] Some form of punishment was also

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[17] E. g.:

"*Camp on the Heights of Charlestown—6th July 1775*" [pp. 34–35]

• • • • •

"A List of the Names and a return of the Numbers of Women and Children in every Corps Encamp'd here to be given in immediately specifying those present with the Corps that the issuing their provisions may be properly regulated, and the quantity ascertained."

"*General Orders Dated Head Quarters—Boston 6th July 1775* [p. 35]

"A return of every Officer, Serjeant, Drummer, Rank and file of each Corps, As also a List of the Names of the Women Children and all other persons followers of the Army, not Soldiers, for whom the Corps draw provisions to be given to the Dy Adjutt Genl on Wednesday Morning next."

"*Head Qrs Wednesday, 13th March 1776* [p. 235]

• • • • •

"Each Corps to apply immediately at No 16 on the long Wharf for a Barrel of Salt fish, to be divided among the Men & Women."

"*Head Qrs Thursday 2d May 1776* [p. 262]

• • • • •

"Six Women pr Compy will be allowed to embark with each Rgt, the Commanding Officers will be responsible that no more Women are received on board nor any Children.

"Provisions will be allowed at the rate of half a Ration for each Woman, & a Quarter for each Child that is left behind."

"*Hd Qrs Halifax Tuesday 21st May 1776* [p. 287]

• • • • •

"The Commanding Officers of Regimt & Corps are desired to send returns immediately to the Deputy Qr Mastr Genl of the Number of Officers men & Women that they allot to their respective Transports in order that provisions may be put on Board accordingly."

[18] E. g.:

"*Head Quarters Boston 18th Novr 1775* [p. 143]

• • • • •

ontemplated, often merely by dismissal from camp, ut sometimes more severely. Mr. Blumenthal's book, p. 42) reports that:

> The wife of a private who was detected as a receiver of stolen goods was sentenced to "one

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"Women belonging to the Army will not be Allowed to be present at any Fires that may happen."

"*Head-Qrs Boston, 30th Decr 1775* [p. 185]

• • • •

hundred lashes on her bare back, with a cat-o'-nine tails, at the cart's tail, in different portions of the most conspicuous parts of the town, and to be imprisoned three months."

And for a later period, General Burgoyne's Orderly Book reports the following:

> CAMP NEAR TICONDEROGA,
> 3d July, 1777.
> Countersign, *Dover.*
>
> Parole, *St. Honora.*
>
> Brigadier Generals and Brigade Majors as yesterday.
>
> Field Officer Piequet British, Lieut. Col. *Hill.*
>
> Field Officer Piequet German, Major *Paffem.*
>
> It being apparent that Liquor is sold or given to the Savages, nothwithstanding the positive and repeated Orders to the Contrary, the Commanding Officers are to assemble the Sutlers and Women of the respective Regiments, and inform them that the first person found guilty of disobedience shall instantly have their liquors and sutling stores destroyed and turned out of Camp, besides receiving such Corporal *Punishment* as a Court Martial shall inflict. * * * [p. 24]

Other British cases of the trial of women as retainers to the camp include the general court-martial in December, 1775, in Boston, of Anne Hennesy, wife of a private, who was charged with her husband of having broken into a house and stolen property. Both were found not guilty.[19] A general court-martial sitting in Quebec October 26 to November 1, 1760, tried

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"Women belonging to the Army *convicted* of selling Spirituous Liquors will be confined in the Provost till their is an oppy of sending them away from hence." (emphasis added)

[19] *General Courts Martial for Marching Regiments, 1775 to 1776,* folio 202, Public Record Office, London.

Elinor Russell, wife of a soldier of the 35th Regiment, for receiving and buying stolen goods. She was found not guilty.[2] In March, 1761, a general court martial held in Montreal tried Katherine David, "spouse of Mr. Bove," and Etief, a Negro woman, for receiving stolen property. It should be noted that these last two cases occurred in peace time, the French and Indian War having ended and the French having signed terms of capitulation on September 8, 1760.

At Freehold, New Jersey, on June 27, 1778, Elizabeth Clarke, a "follower of the army", was found guilty by a general court-martial of violation of the articles of war for plundering and destroying the house of a farmer, and sentenced to 100 lashes "and then to be drummed out of the Army." The same general court-martial found Mary Colethate, another follower of the army, not guilty of the same offense. Two other women were tried by a general court-martial sitting on Long Island in July 1778 and found not guilty. One was Mary Jefferies, "follower of the Army", tried for persuading a soldier to desert. The other was Lucretia Ellis, described as a nurse in the regimental hospital, who was tried for murder.

3. This British practice was carried into the American armies during the revolution. Mr. Blumenthal's book reports (pp. 60-61):

> Among American militia and the Continental line there were far fewer camp wives or other women than with the enemy. Many of the colonial soldiery, whether seasoned volunteers

[2] These and the immediately succeeding cases were obtained from unpublished documents in the Public Record Office, London.

> or raw levies, though married were footloose or homeless as a consequence of localities occupied by the British; hence uprooted wives often went along. Efforts were constantly made to curb irregularities and to keep down strumpet stragglers. The basic reasons for permitting camp women were not only that the practice prevailed among all armies, and the knowledge that quotas of women were with the British, but the inescapable fact that inroads of the redcoats had rendered patriot flight necessary in several areas, together with the natural desire of the women to care for their men—an impulse recognized by the American military leaders.

And further (p. 72):

> As the war dragged on, the army was welded, and the recognition of camp women as a collateral part of the forces became imperative. A routine grew up in this as in other matters. That discipline was instilled into the new Continental Army is seen by the orders. In the 2nd and 4th New York Regiments there were more than three hundred courts-martial cases from 1778 to 1783.

The *Writings of Washington* reveal that he regarded accompanying women as a necessary, if not always wholly desirable, part of his forces. Thus in a letter to the Superintendent of Finance dated January 29, 1783 (v. 26, Writings, pp. 78–79), he explained what was evidently regarded as excess expenditure for women:

> dear Sir: As I never saw, nor never heard of the resolve of Congress spoken of the Secretary at War (as mentioned in your letter of

the 21st Inst.) and conceive it a right inherent, with Command to limit (as circumstances and the nature of Service may require) the proportion of Women to the Men of an Army I confess I felt myself hurt by the interference of other departments without any previous notice or communication of sentiments with me on the Subject.

* * * * * *

It will appear, by having recurrence to my Orderly Book, that an oeconomical attention to the public interest, in this case, has not been wanting; but that upon every return of the number of Women called for (at different periods) when compared with the totality of the Army, it has been found, that no general Rule consistent with American, or British Customs, could be established that would not encrease the agregate amount of the Issues and therefore that it was better to submit to a surplusage in some Corps than to render the expence greater and the evil more extensive by adopting a limitation whh. would pervade the whole Army, especially too, as some of those Corps were, and still are, under particular circumstances, for instance the Regiments of York, which, in part, are composed of Long Islanders and others who deal with their families when the enemy obtained possession of those places and have no other means of Subsistance. The Cries of these Women; the sufferings of their Children, and the complaints of the Husbands would admit of no alternative. The latter with too much justice remarked "If *pay* is with-held from *us*, and *Provisions* from our *Wives* and *Children* we must all starve together; or commit Acts which may involve us

> in ruin." Our Wives add they "could earn their Rations, but the Soldier, nay the Officer, for whom they Wash has naught to pay them." In a word, I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion, perhaps to the Enemy, some of the oldest and best Soldiers in the Service. * * *

And in a letter to Major General Knox, dated March 8, 1783, he said (v. 26, p. 199):

> Dear Sir; The Women of the New York Regt. of Artillery have applied to me on the Subject of allowing them and their Children Provisions.
>
> The number of Women and Children in the New York Regiments of Infantry, before the new System of Issues took place obliged me, either to depart from that System and allow them provision or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives. I preferred the former and accordingly directed that the whole of the Women and Children then with the Troops, should be allowed to draw as usual. * * *

The report of a meeting of the Board of General Officers on June 12, 1781 (v. 22, pp. 202-203), contains the following:

> The Commander in Chief urged to the Board the necessity of oeconomising Provisions, and recommended to the Generals, particularly the Brigadiers, the Necessity of inspecting the Returns made by their Commissaries upon every drawing Day, * * *. He also desired

them to take the following Matters into Consideration and report upon them accordingly.

* * * * *

4th: The proportion of Women which ought to be allowed to any given Number of Men, and to whom Rations shall be allowed.

That Washington considered the accompanying women subject to court martial jurisdiction is clear from the following order dealing with the constantly troubling problem of transportation (v. 22, p. 233):

General Orders. Head Quarters, New Windsor, Tuesday, June 19, 1781.

* * * * *

No Women will be suffered to ride in Waggons or walk in the ranks this Campaign unless there are very particular reasons for it, of

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The provisions of transportation are illustrated by the following (v. 15, p. 204):

"General Orders. Head Quarters, Smith's Tavern, Monday, June 5th, 1780.

* * * It was too observed that of the heavy baggage of the Army has been very little, if anything diminished, and that the pernicious practice of suffering the women to ride under the Waggons still continues notwithstanding every former prohibition. The General recommends these matters to the particular attention of the officers commanding brigades and that they will take the most vigorous and effectual measures to prevent the like abuses hereafter."

(v. 9, p. 139):

"General orders. Head Quarters, Wilmington, August 27, 1777.

* * * the women are expressly forbid any longer, under any pretence at all, to ride in the waggons, and the officers earnestly called upon to permit no more than are absolutely necessary, and such as are really useful, to follow the army."

> which the General Officer or officer commanding the Division or brigade to which they belong is to be the judge; a written permission only will avail; without this the officers of the day or police are not only authorized to turn them out, but requested to inflict instant punishment upon those who shall be found transgressors of this order.

One cannot dispose of this historical evidence that women accompanying their husbands (or alleged husbands) were treated as an integral part of the army by the fact that the accompanying took place in time of hostilities. The bulk of the available evidence relates to times of hostility because that is the time when the problem would be most troublesome, and because the historical materials for that period have been collected. As set forth, *supra*, the historical evidence also appears to show that women were subject to military jurisdiction in times of peace as well. The very fact that, even in time of hostilities, accompanying wives were considered so necessary that they be kept in camp lest the best soldiers be lost (see *supra*, p. 34) indicates how functionally related to the army the accompanying women were thought to be. Certainly, this evidence makes it clear that the framers of the Constitution, some thirty to thirty-five of whom had military experience in the revolution,[29] would not have been shocked at the thought that soldiers' wives, who accompanied them to camp, would be subject to military jurisdiction. The women, wives as well as

[29] A list of those with military experience is given in Appendix D, *infra*, p. 101.

hangers-on, were obviously regarded as camp followers, subject to military jurisdiction because they were an integral part of the army.

Wives today who accompany their servicemen husbands overseas fulfill a role that is not so different from that of the wives who served with the army in the colonial days. Wives today, as then, are allowed to accompany the army because of the interest which the country has in retaining the soldiers in the service and keeping their morale high. Today, as then, wives prepare meals for their husbands, sew buttons on their uniforms, and attend to their wants. Contrasts exist, but the basic relationship to the army has not changed. Certainly the groups are not so different that what was constitutional for one is unconstitutional for the other.

B. DURING THE REVOLUTIONARY PERIOD, CIVILIAN EMPLOYEES OF THE ARMED FORCES WERE SUBJECT TO MILITARY JURISDICTION.

The historical evidence also establishes that the framers were familiar with the concept of military jurisdiction over civilian employees. After the 1775 Articles of War, the Continental Congress provided in 1776 (Journals of the Continental Congress, Vol. V, p. 800):

> All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war.

And in 1778 (Journals, Vol. X, p. 72):

> *Resolved*, That every person employed either as Commissary, Quarter Master, forage Master

or in any other Civil Department of the Army shall be subject to trial by Court Martial for neglect of duty, or other offence committed in the execution of their office, and upon conviction shall suffer death, or such other punishment as shall be adjudged by sentence of such Court Martial.

The *Writings of Washington* show that such court-martial power was in fact exercised. For example,

General Orders [v. 12, p. 242]

Head Quarters White Plains, Monday, July 27, 1778.

* * * * *

At a General Court Martial, July 17th. 1778, Colo. Putnam, President, Mr. James Davidson, Quarter Master of Colo. James Livingston's Regiment tried for defrauding the soldiers of their Provisions, embezzling Continental Property and disposing of several Articles belonging to the United States, found guilty and sentenced to be cashiered.

General Orders [v. 16, pp. 385–386]

Head Quarters, Moore's House, Friday, October 1, 1779.

At the same Court, Benjamin Ballard, late Assistant Commissary of Issues to General Paterson's Brigade was tried for "Selling rum, flour, pork, hides, tallow and other Stores the property of the public without any orders or authority for so doing and contrary to the tenor of his bond and oath of office."

* * * * *

Mr. Paterson Assistant Commissary of Hides was tried at the same Court for "Giving a Pass to a soldier in the Maryland line without authority."

General Orders [v. 20, p. 96]

Head Quarters, Orangetown, Wednesday, September 27, 1780.

* * * * * *

At the General court martial whereof Colonel H. Jackson is President, the 23d. instant: Thomas Thomson, Forage master to General Hand's brigade was tried for "Exchanging public Oats for bridles."

* * * * * *

At the same Court, Abraham Cooper, a waggoner was tried for "Embezzling public stores when employed in Carting the same to the Army" and acquitted. He is to be released from Confinement.

General Orders [v. 21, p. 10]

Sunday, December 24, 1780.

At a General court martial whereof Colonel H. Jackson was President, held at Westpoint the 16th. instant, Mr. Benjamin Stevens, issuing Commissary at Fishkill, was tried for "Refusing to deliver provisions to Arch. Leake, waggoner of the Hospital on the order of the Steward of the Hospital at Fishkill on which he usually issued, because he, the said Leake, would not receipt in figures for said provision, and also for taking receipts in figures for provisions issued on orders for an indefinite quantity for the said Hospital."

General Orders [v. 21, pp. 22–23]

Thursday, December 28, 1780.

At a General court martial whereof Lieutenant Colonel Forrest was President, held by order of the Honorable the Board of War in Philadelphia the 6th. of December 1780: Mr. Thomas Dewees, Barrack master, was tried on

the following charges vizt. 1st. "Neglect of duty" 2d. "For a partial distribution of wood." 3d. "For undertaking an office he was not qualified to hold having never taken the Oath of Allegiance to the United States or any particular State." 4th. "For not taking the Oath of Office before he acted according to a resolution of Congress of the 15th. of July last." 5th. "For selling public wood to the prejudice of the service."

To Colonel William Shepard [v. 21, p. 190]

Head Quarters, New Windsor, February 5, 1781.

Sir: You will be pleased to Order a General Court Martial to sit at Springfield, or such place as will be most central and convenient, for the tryal of John Collins late Asst Dep Com. M. Stores. The Court to be composed of the Officers of Sheldons Regt. or others in the Vicinity. The charge will be exhibited and testimony adduced by Ezekiel Chevers Esqr Deputy C. M. S.

See also volume 21, pages 215, 354.

The analogy of these offenses to such present day offenses as fraud, embezzlement, black marketeering, etc., is too obvious to need comment.

C. THE CONCEPT OF "IN THE FIELD" WAS NOT LIMITED TO A TIME OF HOSTILITIES BUT COVERED A FORCE PLACED IN A DEFENSIVE POSTURE WITH A VIEW TO A POSSIBLE ENEMY AND ANY FORCE LOCATED WHERE THE CIVIL POWER OF THE HOME GOVERNMENT COULD NOT OPERATE

Despite slight variations in punctuation and phrasing,[24] jurisdiction over retainers to the camp and civilians accompanying the armed forces was always limited to persons accompanying the armies "in the field". The limitation "in the field", however, operates not at all against the constitutionality of Article 2 (11) for, as we develop below, the limitation of Article 2 (11) jurisdiction to civilians accompanying the armed forces into foreign territory where the civil law of the United States cannot operate is wholly in line with the concept of "in the field" that prevailed when the Constitution was adopted. Historically, "in the field", did not mean, as defendants would now have it, accompanying the army in time of actual hostilities in the zone of military operations. Historically, "in the field" meant an area where the nature of the operation or the absence of civil author-

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[24] "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field • • •" (British Articles of War of 1765, Sec. 14, Art. 23) Winthrop, p. 941.

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field • • •" (American Articles of war of 1775, Art. 32) 2 J. Cont. Cong. 111.

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field • • •" (American Articles of War of 1806, Art. 60) Act of April 10, 1806, 2 Stat. 359.

"All retainers to the camp, and all persons serving with the armies of the United States in the field • • •" (American Articles of War of 1874, Art. 63) R. S. §1342.

ity made military control over the whole camp appropriate.

After the civil war, and in particular after the decision in *Ex parte Milligan*, 4 Wall. 2, pointing out, in relation to martial law, that the civil courts of the United States were open and available throughout the United States, the principle developed that military jurisdiction over civilians was unnecessary in the United States in peace-time because civilian courts were available. There then appeared for the first time language to the effect that jurisdiction over civilians could be exercised only in time of war in the theatre of hostilities. This change in the formulation of the scope of court-martial jurisdiction—which continued to reflect the notion that military necessity is a justification for military jurisdiction—took place in connection with cases where the only issue was the exercise of military jurisdiction within the United States and must be considered in the light of that cardinal fact. It also took place 75 years after the Constitution was adopted. The reasons which gave rise to this different wording of the concept of "in the field" do not apply to the situation here, which relates to the necessity for military jurisdiction over persons accompanying the forces into territory where United States civil law does not operate at all. That precise situation was "in the field" as the framers of the Constitution understood it.

1. The British concept of "in the field" in 18th and early 19th centuries is shown by their Articles of War, by writers, and by the British practice. The British

Articles of War of 1765 were very complete, containing over 100 articles of which more than 40 were not incorporated into the Articles adopted by the Continental Congress in 1775. Defendants do not suggest that the omission of these articles in any way reduced the *constitutional* concept of persons subject to military jurisdiction and in fact, as discussed above (*supra*, p. 23), defendants recognize that the British concept of the scope of military jurisdiction is that which the Constitution authorizes.

Article II of Section XX of the British Articles of 1765 read as follows:[23]

> Notwithstanding its being directed in the Eleventh Section of these Our Rules and Articles, that every Commanding Officer is required to deliver up to the Civil Magistrate all such Persons under his Command who shall be accused of any Crimes which are punishable by the known Laws of the Land; yet in Our Garrison of *Gibraltar*, Island of *Minorca*, Forts of *Placentia* and *Annapolis Royal*, where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops are or may be hereafter commanded, and where there is no Form of Our Civil Judicature in Force, the Generals or Governors, or Commanders respectively, are to appoint General Courts-Martial to be held, who are to try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes, Coining or Clapping the Coin of *Great Britain*, or

[23] For example, they included an express provision saying that they should apply to troops raised in America. Art. I, Sec. XIX, Winthrop, p. 946.

> of any Foreign Coin current in the Country or Garrison, and all other Capital Crimes, or other Offences, and punish Offenders with Death, or otherwise, as the Nature of their Crimes shall deserve.[36]

It was thus made explicit that military jurisdiction over other persons was to be more extensive when the troops were "beyond the Seas * * * where there is no Form of Our Civil Judicature in Force".[37] This broad jurisdiction existed in time of peace as well as war.[37]

The military writers bear out and explain the extent of this generally understood scope of British military law. E. Samuel, in his *Historical Account of the British Army and of the Law Military* published in London in 1816, explains the necessity for the exercise of such jurisdiction on pages 691–692, as follows:

> Armies, serving in the field, are at all seasons accompanied by a long train of followers, administering to the support, comfort, and convenience of the troops—some of them public functionaries, such as commissaries, contractors, and their subordinates; and others, of a private condition, as victuallers, shopkeepers, and private dealers, with servants or attendants, attached to the service of the camp, or of

[36] Winthrop, p. 946.

[37] It seems probable that this article was not adopted by the Continental Congress simply because the colonies, unlike the British Empire, did not contemplate sending troops to "any * * * place beyond the Seas * * * where there is no Form of Our Civil Judicature in Force * * *". Today, however, the United States is in a position comparable to that of the British Empire in the 18th century, insofar as deployment of troops is concerned.

individuals retained in it; the number of these different classes of persons bearing a great proportion often to the numbers of those contained in the ranks of armies. These various descriptions of persons live within the boundaries of the camp, have their appointed stations in it, and their persons and their property guarded alike with the soldiery: they are stationary as it is stationary, and move whenever it moves; all their dealings and transactions are with the military state: and their peace and quiet is so intimately connected with that of the military body, that the one cannot be disturbed without the other. Being so blended together in their local situation, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both: and the ordinary law, being wholly incompetent in its provisions and means to the military state and its affairs; which is admitted, in the formation by the legislature of separate and especial regulations for its government; and there being neither civil courts, nor instruments in the camp for the administration of the ordinary laws; and in foreign countries, the common field of operation to our armies, the laws themselves being wanting, the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could be safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.

Mr. Blumenthal, whose study of *Women Camp Followers of the American Revolution* has been referred to above (*supra*, p. 26), has, in response to an inquiry by the Department of Justice, written his conclusions as to the treatment of women camp followers in time of peace, in the pre-revolutionary period, although, because his files were unavailable, he was not able to furnish full documentation. A copy of his letter is set forth in Appendix A, *infra*, p. 82. He states that women were regularly quartered with or near British troops in British possessions in the West Indies and in the American colonies. He concludes, *infra*, p. 84:

> From early days, prior to the Revolution, women who were with British armed forces in British colonial possessions *were subject to court-martial jurisdiction in time of peace*. In frequent instances the records show punishment for female drunkenness, fighting, or theft, by the military authorities.

This historical evidence suggests that, at least as to retainers to the camp, peace-time jurisdiction over civilians was not even limited to the absence of civil authority, since there was civil authority in the colonies, but was based merely on the position of the women as an integral part of an organized camp, at what was considered an outpost. Whatever its rationale, it does establish that consideration of women accompanying the army in peace time as subject to military jurisdiction in the field was not a concept unknown to the framers of the Constitution.

But the clearest demonstration of exercising court martial jurisdiction over women camp-followers in peace time are those in which the British tried soldiers' wives for murder. Martha Stevens, "camp follower", was tried by general court martial at Saugor, India, for the wilful murder of her reputed husband, Sergeant James Stevens, by stabbing him with a knife. The crime took place on November 11, 1824, with the trial on February 8, 1825. The court found her not guilty of murder but guilty of manslaughter and sentenced her to ten months' imprisonment. The sentence was approved by General Edward Paget, Commander-in-Chief in India and was order executed by James Nicol, Adjutant General of the Army.[28]

Less than a year later, a general court-martial was assembled at Merut on August 6, 1825, to try Hannah Fitchit, a British subject and camp follower and the reputed wife of Private Joseph Fitchit. She was tried for the murder of Private Alexander Laird by stabbing him with a bayonet. She was found guilty of manslaughter and sentenced to prison for two years. The sentence was approved, but on review was mitigated to three months' imprisonment.[29]

In 1831, there was an instance in Delhi in which court-martial of an officer's wife was considered. The records show:

> The resignation had been accepted a month prior to the above transaction; otherwise both Lieutenant R. ——— and Mrs. R. ——— might

[28] Hough, *Precedents in Military Law* (1855), p. 401.
[29] Hough, *op. cit., supra*, p. 402.

> have been tried by a general court-martial; for doubtless the wife of an officer or soldier is a camp-follower.[35]

In view of defendants' recognition that American court-martial jurisdiction was intended to be as extensive as that held by the British, and their further recognition that the line between civil and military authority "remained similarly identical" in the two countries in the years following the revolution (Def. Supp. Br. p. 35), these cases must be considered as authorities directly in point.

2. The American experience during the seventy-five years following the adoption of the Constitution confirms the view that sutlers and retainers were subject to military jurisdiction in the field in time of peace.

For instance, that court-martial jurisdiction might apply to civilians once they left the United States—*i. e.*, were "in the field"—was explicitly understood by the Congress in 1800. In the Rules and Regulations for the Government of the Navy adopted on April 23, 1800, the Congress included Article XXI:

> The crime of murder, when committed by any officer, seaman, or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court martial. [2 Stat. 48.]

This Article applies to civilian seamen,[35a] who by

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[35] Hough, *op. cit.*, *supra*, pp. 628, 630.

[35a] This is abundantly clear from the text which distinguishes between seamen "belonging to any public ship or vessel of the United States" on one hand, and a "person in the navy" or "per-

virtue of the statute were left subject to civilian jurisdiction while within the territory of the United States but when outside that territory—where United States civil courts would not be effective in punishing and deterring crime—were subject to a military trial. This early statute shows the error in defendants' insistence that the Constitution should be construed so as to prohibit any statute, no matter how reasonable, which would provide in peace-time for a court-martial outside the United States for one who, if he were within the United States, would be entitled to a trial by jury.

The controlling concept of remoteness and absence of civil authority continues to be reflected in other materials. In 1814, the Attorney General, in expressing the opinion that punishment by court-martial of offences committed on board vessels commissioned under letters-of-marque was contemplated only when such offences happened out of the jurisdiction of the United States, said (1 Op. Atty Gen. 177):

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sons belonging to the navy" on the other. See, *e. g.* Articles XIII, XVI, XVII, XVIII, XXXII. Contemporary statutes referred to civilian personnel as "seamen" whether on merchant vessels (1 Stat. 729) or on other public vessels of the United States, such as revenue cutters (3 Stat. 127). The 1862 Article on the same point made it explicit that it applied to any "person belonging to any public vessel of The United States." (12 Stat. 602).

See Kensil Bell, "*Always Ready!*"—*The Story of the United States Coast Guard* (1943) for examples of public vessels manned by civilian seamen in 1800.

> The reason for the distinction may probably have been, that, unless the authority of the court-martial had been recognised for offences committed on board of those vessels when abroad, no punishment could have followed them—it being matter of great doubt how far the common code of the United States extends to the high seas; but for all such offences as may take place on board of them while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The jurisdiction of the military tribunals is not to be stretched by implication.

Similarly, actual cases arising between the War of 1812 and the Civil War support the conclusion that sutlers or retainers to the camp were "in the field" in time of peace if they were with the military away from available civil courts. These cases disprove defendants' categorical statement that "the only civilians ever tried by court-martial prior to 1916, no matter how functionally connected with the forces, were those who accompanied those forces 'in the field' in time of war, declared or otherwise—and 'in the field' was always construed to mean a theater of operations where hostilities were in progress" (Def. Supp. Br., p. 40).

The general practice was stated by the Judge Advocate General of the Army in 1866, as follows:

> "[It] . . . has been the general usage of the service in times of peace, that a detachment of troops is an army 'in the field' when on the

march, or at a post remote from civil jurisdiction."[5]

Available court-martial records supply detailed instances. In 1825, William Armistead, a sutler, was tried[6] and acquitted by court-martial at Fortress Monroe near Norfolk, Virginia, of mutiny and violation of duty, and of conduct subversive of good order and discipline.[7] There are no records of any hostilities in this area at that time. Another sutler, Jabez Burchard, was tried by court-martial in the same year at Fort Washington, Maryland, across the river from Alexandria, Virginia.[8] He challenged the jurisdiction of the court to try him, but the jurisdiction was sustained. His only punishment, however, was dismissal as a sutler.[9] Historical records likewise fail to reveal any hostilities in the area.

On August 1, 1833, W. O. West, a sutler, was tried by court-martial at Fort Gibson, for disobedience of orders.[10] There were several Fort Gibsons in the United States at the time, but at none of them were there any hostilities.[11] In 1838, records show that a clerk of a sutler, J. W. Wiese, was tried by court-martial at Fort Brooke, Florida.[12] This was during the period of the "Second Seminole War" and despite

[5] Opinion of the JAG of the Army, Nov. 15, 1866, 23 Letters sent, 331 (National Archives), quoted in full *infra*, p. —.

[6] *U. S. v. Armistead*, No. C 68, National Archives.

[7] *U. S. v. Burchard*, No. V 15, National Archives.

[8] *U. S. v. West*, No. BB 149, National Archives.

[9] The most war-like would have been Gibson City, Illinois, not far from where the Black Hawk War had ended with the capture of Black Hawk on August 2, 1832, a year earlier.

[10] *U. S. v. Wiese*, No. CC 488, National Archives.

the fact that there were no real military engagements it might possibly be classified as a time of "hostilities".

There was a series of court-martial trials at Camp Scott in Utah Territory in 1858. To meet reported defiance of federal authority by the Mormons, President Buchanan sent some 2,500 men out to the Territory. Some of their wagons and horses were stolen, and the troops spent the winter at Camp Scott. In the spring, an agreement with the Mormons was reached and most of the troops were sent elsewhere. This was not a war situation but the army was in the field. Among those tried by court-martial were James Trader[27] and William C. Barnard,[28] "citizen employees" of the Quartermaster Corps. Both of them were found guilty of conduct prejudicial to good order and discipline and given periods of confinement, one of which was remitted entirely and the other in part. Henry Ringsmer, a retainer serving with the army at Fort Bridger, Utah Territory, was tried there in 1858 by court-martial for an offense committed at Camp Scott.[29] In October 1849 five civilian seamen on board the *Ewing*, a public vessel of the United States, were tried and convicted by naval court martial for mutiny with intent to kill, off the coast of California. A plea to the jurisdiction was rejected.[30]

It is thus evident that before the Civil War the concept of "in the field" which gave the army jurisdiction over retainers and sutlers was not at all limited to a theater of operations in war-time. At the

[27] *U. S.* v. *Trader*, No. HH 882, National Archives.
[28] *U. S.* v. *Barnard*, No. HH 895, National Archives.
[29] *U. S.* v. *Ringsmer*, No. HH 880, National Archives.
[30] *U. S.* v. *Black, et al.*, No. 1237 (Navy), National Archives.

very least, it covered an organized camp in a remote place where the civil law of the United States was not functioning.

It was with this background of practical interpretation of the constitutional power that the Judge Advocate General of the Army gave his opinion in 1866 (to which we have already referred, *supra*, pp. 50-51):

> WAR DEPARTMENT,
> BUREAU OF MILITARY JUSTICE,
> *November 15, 1866.*
>
> **Respectfully returned to Bvt. Brig. Gen. Wm. M. Dunn, Asst Judge Adv. Genl.**
>
> **It is held by this Bureau and has been the general usage of the service in times of peace, that a detachment of troops is an army "in the field" when on the march, or at a post remote from civil jurisdiction.**
>
> **It has been the custom and is held to be advisable, that civil employees, sutlers and camp followers when guilty of crimes known to the civil law, to turn the parties over to the courts of the vicinity in which the crimes were committed. For minor offenses against good orders and discipline, it has been customary to expel the parties from the Army: If, however, it is sought to punish civil employees in New Mexico, for crimes committed at a post where there are no civil courts before which they can be tried, it is held that they can be brought to trial before a General Court Martial, as they must be considered as serving with "an army in the field" and, therefore, within the provision of the 60th Article of War.**
>
> **J. HOLT**
> ***Judge Advocate General***

In view of this history, there would be no authority at all to support the position now urged by defend-

ants, were it not for the views expressed by Winthrop and other military authorities in the 1870's and thereafter. We believe that these later views cannot reduce the scope of the power conveyed to Congress in the Constitution, and that the contemporary practice existing during the pre- and post-revolutionary period is a better guide to the extent of that power. Moreover, as we shall now show, these later statements reflect the idea, derived from *Ex parte Milligan*, 4 Wall. 2, that military jurisdiction should not extend to civilians where the civil courts are available—a conception not at all applicable to Article 2 (11) which operates outside of the civil jurisdiction of the United States.

3. The landmark case of *Ex parte Milligan*, 4 Wall. 2, decided in 1866, although dealing strictly with martial law, seems to have had a great effect on legal thinking with respect to military jurisdiction generally. In holding that a military commission was not authorized to try in Indiana, where the federal courts were functioning, a person "in nowise connected with the military" (4 Wall. at pp. 121–122), the majority opinion stressed the fact that a person so tried would be deprived of his constitutional rights under the Fifth and Sixth Amendments. The Court noted, at p. 127, that there might be justification for martial law "on the theatre of active military operations, where war really prevails."

These concepts, originally developed with relation to martial law, seem to have been carried over to some of the contemporary thinking on general court

martial jurisdiction, so that Winthrop could later state (p. 101) that the article of war conferring jurisdiction on persons in the field "is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war."

But a brief review of some of the conflicting opinions during this period shows that there was no consensus of interpretation of the *constitutional* powers supporting Winthrop's view.

In 1872, the Attorney General issued an opinion, which Winthrop notes, at p. 101, that civilians serving with troops in Kansas, Colorado, New Mexico, and the Indian territory, at camps where it was necessary to build defensive earthworks and where persons had been killed by Indians, were "in the field". 14 Op. Atty. Gen. 22. The opinion rested primarily on the proposition that the words "in the field" "imply military operations with a view to an enemy" and that an army was "in the field" when it was "engaged in offensive or defensive operations." But the opinion also noted, p. 24:

> Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of "an army in the field."

Subsequently, the Attorney General ruled that civil engineers employed by the Navy were subject to court-martial jurisdiction. 15 Op. Atty. Gen. p. 597. This was done without considering the question of "in the field" at all, but on the theory that such engineers were part of the Navy. A brief opinion

of the Attorney General on June 2, 1876, that a quartermaster's clerk was amenable to court-martial jurisdiction (unpublished opinions, Letterbook No. 4, page 32), again without reference to the "in the field" problem, brought a reaction from the Judge Advocate General of the Army. His two opinions on this subject (available only in the National Archives and printed in Appendix B, *infra*, p. 86) brought a reversal from the Attorney General in his opinions of May 15, 1878 (16 Op. Atty. Gen. 13) and of June 15, 1878 (16 Op. Atty. Gen. 48). Since the case at this stage involved the general question of the status of quartermaster clerks and superintendents of national cemeteries, there was no question of anyone's being in the field and the Attorney General explicitly did not consider the scope of that concept (16 Op. Atty. Gen. at 15).

The consequence of this holding that clerks and employees (not even alleged to be in the field) were not subject to court-martial jurisdiction, seems to have been a general acceptance of the thought that no civilian could be tried by court-martial in time of peace. But all such statements were made with reference to cases within the United States. And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that—barring unusual circumstances—it was no longer possible to be "in the field" in the United States.

Because of the settled conditions in the United States, with civilian courts everywhere available, and because of the policy of the military not to assert jurisdiction over civilians, reflected in the opinions

mentioned above, the question of what constitutes "in the field" in peacetime simply did not arise after the Civil War. That "in the field" in war time was considered a narrow concept" is refuted by the World War I cases, which defendants attempt to dispose of as aberrations, but which seem fully in line with historical concepts that in time of war practically the entire army is "in the field". See our brief in No. 701 on the original argument, pp. 34–37; our reply brief on the original argument, pp. 25–28; our supplemental brief on rehearing, pp. 80–82.

4. Since the historical concept of "in the field" did not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from their own civil jurisdiction, the general rationale which justifies military jurisdiction over civilians who accompany the forces in the field or into occupied territory justifies the exer-

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[40] Wiener, *A Practical Manual of Martial Law*, states (p. 136):

> The controversies here all involve interpretation of "in the field"; this phrase has been broadly construed. Thus, the mate of an army transport, a civilian cook on an army transport, a civilian superintendent in the Quartermaster Corps serving on the Mexican border, and a civilian stenographer and auditor employed in the constructing quartermaster's office at a cantonment in the United States have all been held subject to military law. In one case the civilian driver of the automobile belonging to a contractor doing construction work in a camp in the United States was held to be outside the jurisdiction of a court-martial; but this seems out of line with the next preceding decision, and in any event the case would seem to be one arising in the land forces. [Citations omitted.]

See also *Digest of Opinions of the Judge Advocate General*, 1868, p. [illegible]: "* * * the entire army, as at present mobilized and actively employed, * * *, is an army in the field".

cise of court-martial jurisdiction under Article 2 (11) over civilians who accompany the forces into territory where the United States is not sovereign. The Uniform Code of Military Justice uses the concept of "in the field"—in connection with court-martial jurisdiction over civilians—only for "time of war" (Article 2 (10)). But the *constitutional* concept, as distinguished from its present statutory usage, is not so limited, and that concept supports the validity of Article 2 (11). For that provision covers troops stationed away from American civil jurisdiction; in addition, the basic reason why these troops have been sent overseas is so that they may be placed in a military posture with respect to a possible or potential enemy.[a] Both of these factors indicate that the forces subject to Article 2 (11) are "in the field" in the constitutional sense, as it was understood when the Constitution was adopted.

D. THE CONTINENTAL CONGRESS HAD A BROAD VIEW OF THE REACH OF THE COURT-MARTIAL POWER.

The broad view of the scope of military jurisdiction, from the standpoint of opinion in the last quarter of the 18th century, also appears from the Continental Congress' law of May 19, 1786, after revolutionary hostilities had ceased, giving courts-martial jurisdiction to punish all persons, not merely soldiers, who refused to give evidence at trials by courts-martial. The decision to subject civilians to such court-martial

[a] It is not mere coincidence that both of the killings involved in these cases took place while the Korean hostilities were in progress.

jurisdiction was deliberate as shown by the Journals of the Continental Congress, v. XXX, p. 290:

> Congress took into consideration the report of a committee, consisting of Mr. [Arthur] St. Clair, Mr. [Henry] Lee and Mr. [John] Lawrance, to whom was referred a report of the Secretary of War, on the articles of War and courts Martial; and the following paragraph being under debate:
>
> > That all persons belonging to the forces of the United States, called to give evidence in any cause before a court martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court martial.
>
> A motion was made by Mr. [Charles] Pinckney, seconded by Mr. [John Bubenheim] Bayard, to strike out the words "belonging to the forces of the United States" And on the question, shall those words stand? the yeas and nays being required by Mr. [Rufus] King.
>
> * * *
>
> So the question was lost, and the words were struck out.

This particular action is highly revealing on the state of legal thinking just prior to the adoption of the Constitution. It shows that there was no rigid concept of keeping civilians entirely out of the control of the military even though the civilians had no functional connection with the military. The military necessity of getting evidence for court-martial trials was accepted as sufficient justification for the

punishment of the civilian, not by civil courts but by court-martial.[42] The statute, unimportant perhaps in itself, is significant as showing that there is no foundation in history for the thought that the power to make rules for government of the land and naval forces was so rigid that it could not be expanded to meet military exigencies.

In short, the subjection to court-martial jurisdiction of civilians accompanying the armed forces into foreign territory, where the civil power of the United States is inoperative, where military and international considerations demand control, and where only the military authorities are in a position to act, is wholly in accord with concepts of military jurisdiction prevalent at the time the Constitution was adopted and for a long period thereafter. In particular, it is not contrary to British or American tradition to subject wives accompanying their soldier husbands overseas to jurisdiction by court-martial.

In this case, Congress has selected the court-martial system and its choice must be upheld unless it be

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[42] Another instance of the Continental Congress' broad view of court-martial jurisdiction is the 1777 enactment decreeing punishment by court-martial of any person taken within 30 miles of any city in Pennsylvania, Jersey, and Delaware, which was in the hands of the enemy, who gave information or provisions to the enemy. Journals of the Continental Congress, v. IX, pp. 784–785. This statute pertains to martial law, rather than strict court-martial jurisdiction, but the enactment itself, and Washington's comments on its enforcement, indicate that the ineffectiveness of civil law was a prime factor in its adoption, and that inability of the civil tribunals to deal with these offenses moved the Congress. Washington, *Writings*, vol. 11, pp. 14–15, 258.

held to be unreasonable or arbitrary. As we have proved, that charge clearly cannot be sustained.

III

THE PRACTICAL CONSIDERATIONS ARE RELEVANT AND DEMONSTRATE BOTH THE SERIOUSNESS OF THE PROBLEM AND THE UNAVAILABILITY OF ALTERNATIVES

Defendants, from the limited view of their particular cases, dismiss briefly the practical problem of maintaining order among some 450,000 Americans overseas, Americans whose conduct determines the willingness of foreign governments to allow the presence of our military bases in their countries. We do not suggest that, as serious as these problems are, Congress could dispense with the requirements of a jury trial or an Article III court should those requirements rigidly apply to every exercise of United States jurisdiction over a civilian, no matter where he may be or what the circumstances are. But as we believe we have demonstrated (see *e. g.*, Point I, *supra*, pp. 2–23), the Constitution has no such requirement, and the practical problems are relevant in determining both what is due process and the reasonableness of court-martial jurisdiction over civilian dependents and employees overseas.

A. THERE ARE LARGE NUMBERS OF CIVILIAN EMPLOYEES AND OF DEPENDENTS WHO MUST BE ABROAD FOR THE DEFENSE OF THE COUNTRY

Since the submission of our Supplemental Brief on Rehearing, figures have become available for the number of civilians overseas as of December 31, 1956, who are military dependents, employees, or others

accompanying the armed forces. These later figures, in part based on estimates, include contractor employees and other categories not covered by the previous figures.[*] A breakdown is given in Appendix C, page 109, *infra*. The total number of persons among whom discipline is now maintained under Article 2 (11) of the Uniform Code of Military Justice is estimated at over 450,000, of whom dependents are about 415,000, and direct Government employees, contractor employees, etc., are about 38,000.

Defendants suggest that the "obvious" solution to the problem of maintaining discipline over civilian employees "is to refrain from sending such civilians overseas, and to rely solely upon uniformed personnel to do whatever work is necessary at overseas military installations" (Def. Supp. Br., p. 148). They suggest that the majority of civilian employees are clerks and stenographers who could easily be replaced by men in uniform (Def. Supp. Br., p. 146). In this, defendants are quite mistaken.

Taking their contention most broadly, and lumping together all stenographers, mechanics, guards, clerks, chauffeurs, messengers, anyone at the rate of a grade GS-5 (beginning at $3,670 and which can go as high as $4,480 per year) or under, and all persons paid by the hour, this group accounts for only 9,778 out of 23,282 direct government employees. But the direct employees are generally not the most highly skilled

[*] The largest category not previously given consists of some 5,400 employees of the Military Sea Transport Service serving on U. S. Navy ships deemed subject to military jurisdiction when military personnel are on board.

of the civilians whom defendants suggest the government can do without. There are over 4,500 contractor employees overseas and 1,635 technical representatives, highly skilled technicians and advisers whose services are indispensable to a military force which must increasingly rely on "ever-changing and ever-more complicated scientific equipment." To suggest that the most practical solution is for the United States to send these men home is to argue that the country is constitutionally precluded from using the skilled talents of those civilians who are willing to come overseas to work with the military and willing to subject themselves to its jurisdiction. It is also a recognition by the defendants that there is no other practical way in which these services can be obtained when needed by the United States overseas.

Defendants do not suggest that the *dependents* should be sent home. Nor do they in any way question the fact that to forbid families from accompanying servicemen overseas would seriously affect morale, hamper recruitment, and thereby weaken the national defense. The situation today is not essentially different from that which faced Washington when he decided that he had to keep wives in the camp "or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives." "In a word, I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion * * * some of the oldest and best Soldiers in the Service." (*Supra*, p. 34). There is no question but that in the interests of self-

defense in today's world the United States must be prepared to have some 400,000 dependents overseas living with their servicemen kin, in housing and using provisions and services made available by the United States. In short, there is no real alternative but to have large numbers of American civilians overseas, accompanying, working with, and living with the military forces.

B. BOTH EMPLOYEES AND DEPENDENTS CREATE PROBLEMS OF DISCIPLINE REQUIRING THE EXERCISE OF CRIMINAL JURISDICTION

Defendants, after suggesting that all civilian employees might be sent home, state that "in view of their infrequent occurrence" the problem of criminal acts by civilian dependents is on a par with criminal acts committed by American diplomats abroad (Def. Supp. Br., p. 153). Here too, defendants err. The magnitude of the problem, the propensity to commit offenses, and the effectiveness of administrative sanctions are all drastically different in the civilian portion of the military community.

1. The Magnitude of the Problem

As we have noted, the number of civilian dependents accompanying the military throughout the world is over 400,000. The total number of foreign service American employees outside of the United States, as of December 31, 1956, was 5,883. If one adds the entire overseas citizen staff of the United States Information Agency (1,214), that of the International Cooperation Administration (3,444), and the Department of Agriculture (154), together with their de-

pendents"; this constitutes, on a worldwide basis, a group of United States citizens equal in number to about six per cent of the military dependents alone.

The contrast between the vast number of military dependents among whom order must be maintained and the small number of people connected with our diplomatic posts is brought out even more clearly by considering particular countries such as the two here involved. In the United Kingdom, there were over 46,000 military dependents, as contrasted with some 480[44] Americans connected with the diplomatic missions. In Japan, there were over 68,000 military dependents, as contrasted with some 758[45] Americans connected with the United States missions. From the point of view of numbers alone, it is clear that the problem of administering justice within American communities numbering in the tens of thousands is not "on a par with the problem of possible criminal acts committed by American diplomats abroad" (Def. Supp. Br., p. 153).

2. Civilian dependents commit a substantial number of offenses

Since the defendants concede that military dependents are on the same constitutional footing as military

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[44] Dependents are estimated by the Department of State at 1.5 per employee, which is the rate used by the Department for budget purposes.

[45] State Department, 164; International Cooperation Administration, 9; United States Information Agency, 19; plus estimated dependents, 288.

[46] State Department, 215; International Cooperation Administration, 25; United States Information Agency, 63; plus estimated dependents, 455.

employees (Def. Supp. Br., p. 158), there would seem to be no valid conclusions which could be drawn from differences between the two groups as to the propensity to commit crimes. If it is recognized that it is as essential to the defense of the country to have technicians accompany the armed forces as it is to have service wives, then the need for criminal jurisdiction is plain. For defendants do not deny that among the employee group there are those who create a substantial problem and who commit offenses requiring punishment. And when defendants' suggestion of sending all the employees home is rejected, the only practical alternative is overseas military jurisdiction.

Nonetheless, it should be pointed out the defendants are mistaken in suggesting that "there have been very few trials of civilian dependents, and that there will never be occasion for many" (Def. Supp. Br., p. 149). During the year ending November 30, 1956, figures are available indicating the number of offenses *under foreign law* by Army civilians where jurisdiction was waived or not asserted by the foreign government. In this category, 707 were committed by employees and 417 by civilian dependents. The great bulk of these were traffic offenses, but more serious charges were also involved. There is a natural tendency to deal with dependents administratively, wherever this is possible, which cuts down the number of times court-martial jurisdiction is actually used. Non-traffic cases in which court-martial jurisdiction has been used for dependents include: assault, fraud

against the government, black market activities, drunk and disorderly in a public place, assault, tax evasion, breach of the peace, manufacture of drugs in military payment certificates, and illegal monetary transactions.

There is no question but that there is a criminal problem among the dependents overseas. It does not reach the urban crime rate in the United States (about 8 criminal homicides and 80 aggravated assaults per year per 100,000 of population)[4] but in groups as large as those here involved there does exist a problem which cannot be ignored. The military dependents as a group are totally unlike the foreign service, not only in their size but in their make up. The foreign service is carefully selected and consists in large part of those making that service a career. One serious misstep—by the foreign service officer or his family—and the career may well be ruined. On the other hand, dependents accompanying the forces overseas have obviously had no prior selection (except by the individual members of the forces). The generally accepted standards of conduct among the military community are not as strict and the consequences of getting caught are not as serious to the dependent's or to the servicemen's future.

That the crime rate among military dependents is no higher than it is, and correspondingly that their conduct creates no more problems than it does with foreign countries, reflects the very existence of the court-martial authority. Defendants express doubts as to its validity but none can doubt that, if it were

[4] F. B. I., *Uniform Crime Reports*, Vol. XXVII, No. 1 (1956), p. 7.

found invalid, black market activities by American dependents abroad, to take one example, would undergo a rapid increase.

3. Civilian dependents are treated as subject to United States jurisdiction under the NATO Status of Forces Agreement

Defendants point out that under the literal language of the NATO Agreement the foreign country has primary jurisdiction over crimes committed by American dependents which are crimes under the local law.[*] This does not affect the practical problems in any way. Nor does it alter the fact that while the foreign country may claim the right to punish a military dependent for a local crime, it nonetheless looks to the United States as the one responsible for determining such conduct in the first instance and for seeing to it that it does not happen again.

The authorities quoted in defendants' brief on this point (Def. Supp. Br. p. 152) state that they—

> have seen no case in which foreign authorities claimed or American authorities admitted any distinction between dependents and members of the force in this regard.

This accurately reflects the practical working arrangement in which the United States, as a matter of fact, is the one who takes jurisdiction over most cases involving dependents. During the year ending Novem-

[*] The United States negotiators attempted to obtain this jurisdiction but failed to win agreement because of the objection of other NATO members, six of whom, unlike the United States, were parties to the earlier Brussels Treaty Agreement of 1949 (H. M. Stationery Office Cmd. 7868) which made no provision for apportionment of jurisdiction over defendants.

ber 30, 1956, Army records show 491 cases of dependents involved in local offenses. Of these, the United States received waivers of jurisdiction in 417. Further, in those countries in which the majority of the American military dependents are located there are related or subsidiary agreements making it explicit that the United States is to exercise primary or exclusive jurisdiction over all or most categories of offenses by dependents."

4. The problem of non-American civilians working for the armed forces overseas is wholly different

Defendants point out that the Department of Defense employs some 75,000 non-American civilians in foreign countries and reimburses foreign governments for the wages of some 275,000 additional non-Americans who are employees of those governments. The contention is put forward that the existence of this group, over whom by and large[49] there is no court-martial jurisdiction, supports the argument that there is no practical problem of maintaining order among the 450,000 American nationals accompanying the

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[48] Japan (T. I. A. S. 2492 and 2848); Germany (See Senate Doc. No. 11, 84th Cong., 1st Sess.); Philippines (T. I. A. S. 1775); Netherlands (T. I. A. S. 3174); Greece (T. I. A. S. 3649); see also Leased Bases (E. A. S. 235, T. I. A. S. 2105, T. I. A. S. 2096, T. I. A. S. 2426); Korea (T. I. A. S. 2436); Greenland (T. I. A. S. 2292); Ethiopia (T. I. A. S. 2964). In the light of these published agreements, defendants' statement (Def. Supp. Br. 157) that the problem of exercising the waived jurisdiction "very obviously, has never been explored" is inexplicable.

[49] In some cases, such as in the Leased Bases, or where a foreign national accompanies the forces into a third country, the United States has court-martial jurisdiction over non-U. S. citizens.

forces overseas. But the differences between the two groups, and the reasons why the United States does not need court-martial jurisdiction over foreign local employees, are clear.

The foreign nationals are not a part of the American military contingent; they are not considered so by either government. They are subject, automatically and properly, to their own criminal and judicial system, which is in their own language and consistent with their own standards and procedures of justice. Neither the foreign government nor its people consider the United States responsible for their criminal conduct; when such conduct occurs, it does not create problems between the two governments. The foreign employees have no access to classified information and are rarely in a position to commit security offenses. They do not have the same access to supplies and provisions brought in by the United States nor do they earn foreign exchange; they do not have import or tax-free privileges—all of which lead to black-market activities. They may easily be dismissed and replaced without great inconvenience or expense since, unlike the American employees, they are largely unskilled or are workmen for whom local substitutes can readily be found, such as laborers, carpenters, electricians, drivers, mess-boys, etc. None of the considerations which require the United States to be in a position to exercise criminal jurisdiction over its own military dependents and employees brought from the United States makes it necessary to have jurisdiction over these local citizens at home in their own coun-

try. And even should it be deemed desirable to have such authority, most foreign governments would be unwilling to concede it.

C. THE ALTERNATIVES TO COURT-MARTIAL JURISDICTION SUGGESTED BY DEFENDENTS ARE EITHER INEFFECTIVE OR NOT PRACTICALLY AVAILABLE

1. The sanctions for crimes committed on bases in the United States are not available abroad.

Civilian dependents living within the United States are subject to the criminal laws of the United States and of the State and subject to the jurisdiction of both Federal and State courts. Should a civilian dependent commit murder in a State, he or she could automatically be subject to trial in an American state court. (It should be mentioned that the trial in such a court would not be subject to the grand jury, petit jury, and life-time tenure requirements of the federal Constitution.) Here again, as in the case of the foreign national being tried in his own country abroad, there is no intergovernmental problem, no international friction, no trial of a national of one country under foreign law, in a foreign language, and by unfamiliar procedures. There is likewise no question of one government's looking to another to keep its own house in order.

For lesser offenses committed on a United States base a standard practice is to refer the case to a United States commissioner designated to try petty offenses committed on a federal reservation pursuant to 18 U. S. C. 3401. The Army and Air Force have general regulations relating to this procedure. AR

22-160 (1955), AFR 110-7 (1951), AFR 110-7A (1952). The Navy also uses this procedure under regulations issued by base commanders. Under the statute, "Any person charged with a petty offense may elect, however, to be tried in the district court of the United States." 18 U. S. C. 3401 (b). The fact that this procedure functions for petty offenses committed by civilians on bases within the United States is due to the ready availability of the United States district courts and also, as a practical matter, to the fact that if an accused does not elect to be tried by a United States commissioner he frequently runs the risk of being charged with a more serious offense carrying a possible punishment of more than six months. In usual course, minor traffic offenses on the base are dealt with administratively by revoking or suspending permission to drive on the base, but the more serious ones such as reckless and drunken driving are tried by a commissioner or the district court.[30]

[30] Illustrative of the disposition of cases within the United States may be the experience at the Marine Corps Base at Camp Lejeune, North Carolina. Here, during 1956, twelve cases were referred to the United States Attorney for prosecution in the district court; 63 cases (involving, *e. g.*, drunken driving, illegal hunting, indecent exposure, possession of untaxed alcohol) were tried before the United States commissioner who visits the base once a month for such proceedings; and about 8 cases a week of minor traffic offenses were disposed of administratively by revoking or suspending the privilege of driving on the base. The Armed Forces Special Weapons Project, Sandia Base, Albuquerque, New Mexico, reported that in the last 25 months over 250 cases had been referred to federal district courts or commissioners, cases which it was decided could not be adequately handled administratively.

Thus, the problem of offenses by dependents or employees on military bases in this country can be, and is being, handled by recourse to the existing system of American civil jurisdiction, both federal and state. Court-martial jurisdiction is unnecessary to deal with the problems posed by such crimes. Abroad, the problems arising from these civilian offenses—particularly *vis-à-vis* the host government and its people—are in large part of a different order; and there is no alternative American system of justice overseas which can be utilized. As we have often pointed out, the choice is really between a foreign trial (if a local crime is also involved) and no trial at all; where no foreign offense has been committed, the Hobson's choice is no trial.[51] Neither alternative is satisfactory to Congress, which quite properly believed that the situation abroad was quite different from that in this country.

2. The experience of the United States foreign service does not provide a guide for dealing with military dependents or employees abroad.

As discussed above (*supra*, pp. 65–67), the small size of the foreign service and the highly selected calibre of its personnel make it possible to maintain order and discipline within the corps by means which are totally inadequate for dealing with the 450,000

[51] For instance, in the United States narcotics violations are violations of American law and state and federal authorities are available to provide punishment. Overseas, in many countries, a civilian accompanying the armed forces commits no crime whatsoever by dealing in narcotics unless he is subject to the Uniform Code of Military Justice.

persons who accompany the military overseas. The foreign service relies entirely on the deterrent effect of reprimand, suspension without pay for periods up to 30 days, and dismissal. A reprimand in the file of a foreign service officer may mean years of assignment at a poor post and less chance of promotion. A letter of reprimand to the wife of a soldier or to a technician may mean next to nothing. Both the United States Information Agency and the International Cooperation Administration, though without the same tradition of a career service, are in much the same position as the foreign service, and find that the similar processes of selection and similar deterrents result in a crime rate that is for all intents and purposes zero.

3. The suggested alternative of bringing all civilian defendants to the United States for trial is not practically available nor would it assure defendants a fair trial.

Defendants suggest that in the "air age" it would be a comparatively simple matter to bring all military dependents and employees who are accused of committing an offense abroad to the United States, where proceedings of a grand jury, a petit jury and a trial before a life-tenure judge could be arranged. If the time consumed in physical transportation to this country were the critical problem, the airplane might meet it, but the difficulties are on a broader plane—as we have already pointed out in our Reply Brief on the original argument, pp. 20–22, and in our Supplemental Brief on Rehearing, pp. 46–49, 59–60, 62–63. The difficulties lie in the realm of conflicting sovereignties,

competing jurisdictions, national pride, different interests, and problems of trial and proof; not the adequacy of transportation equipment. As a consequence, the practical opportunity of returning an American to this country and trying him here for a crime committed abroad is today no greater and probably less—than it has ever been.

In the first place, as discussed in our Supplemental Brief on Rehearing, pp. 54–55, the general criminal laws of the United States, with few exceptions, do not now make conduct in a foreign country a crime against United States law. Drunken driving, black market activity, assault and manslaughter in Japan, are not crimes for which an accused can be tried in the state or federal courts of this country. Should the defendants here be held to have a right to a jury trial, the United States cannot legally give them that kind of a trial. If the defendants have not violated the Uniform Code of Military Justice, they are not now subject to trial by the United States anywhere nor by any kind of a court.

Defendants say that (Def. Supp. Br., p. 154) "legislation is necessary to make her [a civilian dependent] triable in a United States court", but this proposal dismisses with a phrase the serious problems of extraterritoriality, the scope of such a statute, conflicting national interests, and double jeopardy. On these issues, we refer the Court to the discussion in our Supplemental Brief on Rehearing, at pp. 46–49. The problems referred to in that discussion are real and present. Governments (including our own) are very

loath to permit the removal, for a foreign trial, of persons who have committed an offense against the local law (particularly if the local sovereign is uncertain whether sufficient witnesses can be transported to the other country to prove the crime there). On the other hand, the nations of the world have generally accepted the concept of a foreign military trial on-the-spot for the military and those who accompany them abroad. The short of it is that, once again, it is unlikely that foreign governments would agree to the removal for trial here of civilian dependents like Mrs. Covert and Mrs. Smith, and that the alternative would be a foreign trial or none at all—or perhaps an American trial in this country only after trial and punishment in the land where the crime was committed.

Assuming, however, both a Congressional enactment covering crimes committed by Americans abroad and consent by the foreign state to removal to this country, there would still be exceedingly grave problems. As we have pointed out in our prior briefs, the very remoteness of the trial would lessen the chance of prosecution for a large number of crimes for which criminal sanctions are required. The offenses committed by military employees and dependents abroad can be broken down into four categories. At the bottom, there is a vast number of minor traffic offenses, and other minor infractions of rules such as disturbing the peace. Most of these are dealt with administratively, some by summary court-martial. It may surely be assumed that those cases would not be taken to the United States for trial.

The second category includes the serious automobile violations, such as drunken and reckless driving,

and comparable lesser crimes. Experience in all commands in this country and abroad demonstrates that such offenses require the criminal sanction of substantial fines and short jail sentences which may or may not be suspended. Numerically, these are the most common offenses by civilians which are now handled by court-martial jurisdiction overseas. Should punishment for these offenses require transferring the accused and witnesses to the United States for trial, it may be a foregone conclusion that the offenses would go unpunished. To inflict, say, a fine of $250 and a five-day sentence, few commanding officers would authorize the government to spend perhaps thousands of dollars for transportation and take two or more men away from their work for at least a week. Aside from the expense, the foreign witnesses may well not be available to come here, and they cannot be compelled to do so. The crime would go unpunished and, in a group of over 400,000, it may again be safely assumed that the consequence of lack of punishment would be an increase in crime.

The third category of offenses is comprised of the common felonies including larceny, assault, converting government property, etc., and also includes the economic crimes of black market activity and smuggling on an organized basis. Here, criminal penalties are obviously called for, but once again it is doubtful whether there would be sufficient sureness of a trial in the United States to act as an adequate deterrent. Too often, the difficulties of obtaining permission from the foreign government, arranging for wit-

nesses, and disruption of local operations would appear to outweigh the necessity of punishing the particular crime.

The final category, in which there are few cases, is that of homicides and other major crimes. For these, and for some of the felonies in the third category, attempt would no doubt be made to arrange for trial in the United States. Defendants dismiss the problem of bringing witnesses to the United States as "only talk" (Def. Supp. Br., p. 155). But conclusions as to the general problem cannot be drawn from the facts of the present cases. Two of the most common type of witnesses whose presence is required are co-conspirators and local police officials. In the case of organized smuggling or black-market activities, the co-conspirators are usually foreign citizens who have violated their own laws. Experience shows that they are unwilling to come to the United States to testify, even should their government be willing to let them out of the jurisdiction, which it frequently is not. Where local police and other officials are witnesses, there have in the past been problems in arranging to have them come to the United States. Where local citizens of the foreign country are the witnesses, they frequently decline to come so that they will not become involved. The local government, which would lend its process to make them available within the country, will not, and usually cannot, require them to go to the United States to testify.[32]

[32] In this connection, it must be remembered that the defendant would have the burden of securing and transporting witnesses, including non-Americans, unless Congress made some special provision.

Our experience of the past few years shows specifically that the assumption that foreign witnesses may be obtained whenever the United States government would like to have them is unwarranted. In the treason cases, immediately after World War II, there was a disposition among witnesses to cooperate, understandable enough in light of the fact that the United States was then the occupying power. But the government's general experience with the limited group of offenses that are now extraterritorial crimes against the United States, or with offenses in this country where foreign witnesses are needed, demonstrates that many witnesses will not come to the United States even if the government is willing to transport them. For example, in 1955, in connection with a broad investigation of passport frauds, government counsel was sent abroad with the names of fifty witnesses who, investigation had indicated, had information bearing on some 30 different cases. Twenty cases were dropped because twenty-six witnesses refused to come to the United States. In a recent tax fraud case, where two Italian witnesses had originally agreed to testify for the government, they subsequently declined to come here at the time of trial, and if is the government's view that the absence of the witnesses explains the judgment of acquittal which resulted (*United States* v. *Shahadi*, D. N. J.). In two recent cases, one in Europe and one in the Phillipines, involving bribery of federal officers, the government was unable to proceed because the key foreign witnesses refused to come to the United States.

Defense counsel usually have even greater problems than the government in obtaining evidence abroad and persuading witnesses to come to this country. In the case of *United States* v. *Powell*, now pending in the Northern District of California, the attorney for a defendant, charged with sedition, has been trying to proceed to Soviet China to take depositions of witnesses for the defense, against the judgment of the State Department that it was not in the best interests of the United States to issue a passport for such purpose. Leaving out the consideration of the particular issues in that case, it does illustrate the problems that face a defendant when he must go to trial in the United States.

Under present circumstances, only a limited number of cases arise where foreign witnesses are significant. If there is to be no on-the-spot jurisdiction by the United States over the many civilians accompanying the armed forces overseas, but trial in the United States, the problems will necessarily multiply tremendously.

In sum, the alternatives suggested by defendants are not practically available. The truth, as we have stressed, is that the only practically available alternative for most criminal offenses is trial by the foreign country under its law, against which Congress has opted with respect to persons like defendants. One further consequence of substantially increasing the number of times that persons connected with the American military are tried in foreign courts is the effect it would have both on the willingness of military and civilians to go abroad and on the political willingness of this country to maintain its military bases abroad.

It is not enough for the Executive to be satisfied that the foreign procedures are fair and just. Congress and the public must believe it. The Senate Resolution which accompanied the Senate's consent to ratification of the NATO Status of Forces Agreement,[a] indicates a basic distrust of foreign trials for Americans and suggests that the more foreign trials the greater may be the pressure to "bring the boys home", a step which this government believes would seriously weaken its national defense. In considering the reasonableness of American court-martial jurisdiction over civilians accompanying the armed forces abroad, such considerations are relevant not only for Congress but for the constitutional issues as well.

Respectfully submitted.

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FEBRUARY 1957.

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[a] P. 36, TIAS 2546. The Resolution requested the examination of the laws of foreign countries and an automatic request for waiver of foreign jurisdiction in certain cases. More extreme views have been expressed. See, e. g., H. J. Res. 177, 85th Cong., 1st Sess. (introduced by Mrs. St. George); *Task Force*, vol. 2, No. 5; Veterans of Foreign Wars Resolution No. 137 (1954).

APPENDIX A

LETTER FROM MR. WALTER HART BLUMENTHAL, AUTHOR OF THE BOOK "WOMEN CAMP FOLLOWERS OF THE AMERICAN REVOLUTION," CONCERNING MILITARY JURISDICTION OVER WOMEN CAMP-FOLLOWERS IN TIME OF PEACE IN THE PERIOD BEFORE THE AMERICAN REVOLUTION

PHILADELPHIA, *February 14, 1957.*

DEPARTMENT OF JUSTICE,
MR. ROGER FISHER,
Assistant to the Solicitor General,
Office of the Solicitor General,
Washington, D. C.

DEAR SIR: In reply to your letter of February 13, I am sending herewith a statement in summary of data and of prevailing conditions, prior to the Revolution, as requested by you.

Trusting that this information may be along the lines you desire, I am,

Sincerely yours,

WALTER HART BLUMENTHAL.

FEBRUARY 14, 1957.

That the British military forces were accompanied by women and children in peace-time prior to the beginning of the American War for Independence is seen by the presence of women and children in Jamaica with the British detachments there for more

than a century. That they had been quartered there in Jamaica is seen by the fact that, at the outbreak of the Revolution, Lord George Germain ordered a detachment from Jamaica to Virginia, consisting of 374 officers and men, forty women, and servants, followed by similar detachments (Allen French, "First Year of the American Revolution," Boston, 1934, p. 106 note.)

In all the British possessions in the West Indies, for many decades prior to the Revolution, it was customary for women and children to be quartered with or near the British troops in peace-time.

Women in peace-time were likewise with British forces in Canada following the capture of Quebec in 1763 and were quartered with the British troops stationed in Canada, prior to the Revolution. This practice prevailed also with the French in their possession of Canada prior to British conquest. As early as mid-17th century the French regiment of Carignan-Salières was accompanied by women in being sent from France for service in French Canada in peace-time occupancy.

(Note: In my book "Women Camp Followers of the American Revolution," pp. 45–51, are data concerning both peace-time and war-time women on the ration prior to the Revolution, with British colonial troops.)

Proof that women were with peace-time British colonial forces in America over protracted periods is afforded by a communication from one such woman, Martha May, dated June 4, 1758, to Colonel Henry Bouquet. Written by her (or for her) from Carlisle,

Pa., jail, where her husband was confined for misdemeanor, she wrote: "I have been a Wife 22 years and have traveled with my Husband every Place or Country the Company marcht too" * * * (Papers of Col. Henry Bouquet (1758), Pa. Historical Commission, Harrisburg, 1941, p. 78).

The fact that rations were issued uncooked to British forces in the American colonial period, and in the period of the War for Independence, and that washing of laundry, and sewing, were necessary, also nursing of the sick, made it a practice from early colonial days for women in peace-time to be on the ration with British forces in Canada (after 1763), in the British possessions of the West Indies, and elsewhere. Laxity prevailed as to the marital status of such women. Punishments were whipping or confinement for infractions of discipline. From early days, prior to the Revolution, women who were with British armed forces in British colonial possessions *were subject to court-martial jurisdiction in time of peace.* In frequent instances the records show punishment for female drunkenness, fighting, or theft, by the military authorities.

Camp women in peace-time, prior to Braddock's campaign against the French at Fort Duquesne, were numerous, and were subject to military jurisdiction. Twenty years before the Declaration of Independence, a feminine contingent was conveyed from England with Braddock's command, prior to the outset of the French and Indian War (1754–60).

An army order by Major-General Braddock, at Alexandria, April 7, 1755, read: "A greater number of Women having been brought over than those allowed by the Government sufficient for washing with a view that the Hospital might be served; and complaint being made that a concert [conspiracy] is entered into not to serve without exorbitant wages, a Return will be called for of those who shall refuse to serve for six pence per day and their Provisions that they may be turned out of camp and others got in their places" (Edward Braddock's Orderly Books, Feb. 26 to June 17, 1755, Cumberland, Md., 1880, p. 17).

Finally, from the earliest colonial settlement of Virginia by the British, women in peace-time were with British military corps, and subject to court-martial jurisdiction. The earliest Virginia colonial authorities were military, not civil, appointees of the Home British Government. Large contingents of intended brides were shipped over from English ports to Jamestown, in 1619 and thereafter. These were subject to the military authority in the colony in peace-time as well as in time of Indian hostilities.

From 1620 onward, in colonial Virginia, as also in provincial Maryland, offenses by women in peace-time were subject to the military jurisdiction of the British authorities. In the modern sense, there was then and there no civil government; the royal appointed Governor was supreme in military authority.

S/Walter Hart Blumenthal.
Walter Hart Blumenthal.

APPENDIX B

Opinions of the Judge Advocate General of 1877 indicating that at that time there was no well-established rule as to what civilians were subject to court-martial jurisdiction in time of peace. The first of these letters is found in 38 Letters Sent 557 (National Archives); the second in 38 Letters Sent 641 (National Archives). The opinions of the Attorney General which were requested in these letters appear in 16 Op. Att. Gen. 13, 48.

W.

641 of 1876

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,
April 16, 1877.

Superintendents of National Cemeteries

HON. GEO. W. MCCRARY,
Secretary of War.

Chas. H. Barth

SIR: I have the honor to return herewith the accompanying papers, referred to me from your Office, "for remarks," and to submit thereon as follows:

1. These papers relate—*first*—to the question of the amenability to military jurisdiction and trial by court martial of *Superintendents of National Cemeteries*. This question, having been brought up by the Quartermaster General, and referred to this Bureau, I had the honor to recommend, by the within endorsement of November 27th last, that the question be submitted to the Attorney General for opinion, and it was submitted accordingly on Dec. 6th

last. I had indeed no doubt myself on the question, nor had my predecessor, Judge Advocate General Holt, who, on Oct. 1873, had given an official opinion to the effect that, in view of the fact that Superintendents of Cemeteries were no part of the army, but civilians, being indeed required to be civilians by positive statute—R. S., Sec. 4874, the only law on the subject* to hold them amenable to the military jurisdiction in time of peace involved an absurdity. This is certainly my own view, it being further my opinion that the 63d Article of War† refers to, and is operative only in, (as the terms "camp" and "in the field" indicate,) a time of war, i. e. war with a foreign power, or with Indians, or a civil war; and can have no application in time of peace. Sundry other of the Articles of War are applicable only to time of war; and, as to this, or any other Article or Statute, even if it did *in express terms* assume to extend the military jurisdiction to civilians in time of peace, it would, in my opinion, necessarily be unconstitutional and of no legal effect. In my

*"The Superintendent of the national cemeteries shall be selected from meritorious and trustworthy soldiers, either commissioned or enlisted men of the volunteer or regular Army, *who have been honorably mustered out or discharged from the service of the United States*, and who may have been disabled for active field service in the line of duty."

†"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."

view, no possible case can arise, in time of peace, where a civilian can legally be made liable to military arrest and trial for a criminal or other offence, and any statute which attempts to render him so amenable must necessarily be wholly void. In time of *war* civilians serving with troops engaged in hostile operations, become, for offences committed upon the theatre of war, amenable under the 63d Article above cited, and indeed independently of it, to the Military jurisdiction. So, during the prevalence of Martial law or Military government, (See Opinion of Chase, C. J., in *In re* Milligan, 4 Wall. 142,) civilians may be made so amenable in particular cases, though here the exceptional jurisdiction can properly be enforced only with great delicacy and caution. But except in these instances, such a jurisdiction cannot be exercised without, in my judgment, the clearest violation of the Constitution; and to exercise it in fact would be an act of arbitrary power wholly repugnant to the principles upon which our system of government is based.

So obvious to my mind is all this, that, (in view of the terms of Sec. 4874 of the Revised Statutes, in regard to Superintendents of National Cemeteries,) I should never have thought of recommending the reference of the question of their amenability to military trial, to the Attorney General, had it not been for the recent opinion (contained with the accompanying papers) of that official in, (or rather relating to, for the opinion was in terms general,) the

case of *Barth*, to which the other papers, herewith returned, refer. It was the existence of this opinion alone that induced such recommendation, and it is the fact alone that it still exists which induces the request with which this communication concludes.

2. *Chas. H. Barth* was a quartermaster's clerk, employed by Lieut. Col. A. R. Eddy, Depty. Quartermaster General, and chief quartermaster of the military Department of California, stationed at San Francisco. Barth was not an officer of the army nor an enlisted man, but a civilian clerk paid out of the annual appropriation for the quartermasters department of the Army. Employed at San Francisco, in time of peace, his *status* was precisely that of any civilian clerk employed at the present time in the War Department at Washington; his only relation to the military service being that he performed labor for the United States in the military branch of the executive department of the government. Barth, having been detected in the forgery of the name of a civilian contractor on checks issued to his order by the United States, through Lieut. Col. Eddy, and in the utterance of these checks when forged, by selling them to a money broker in San Francisco and getting the money upon them, (as also of the falsification of official papers in violation of Sec. 5438, Rev. Stats.,) was (illegally as I hold,) placed in *military arrest* by the order of the Department Commander, General Schofield, and the question was thereupon raised by him whether

Barth could legally be tried by a court martial. This Bureau gave its opinion unhesitatingly in the negative, but General Schofield, who took a contrary view, having induced the question to be referred by the Secretary of War to Attorney General Taft, that official, on June 2, 1876, rendered a very brief opinion in which he concurred in the view of Genl. Schofield. This opinion, which in effect held all the clerks—male and female—of the War Department subject to the military jurisdiction and to trial by court martial, and the principle of which was indeed to hold the Secretary of War, whose relation to the "land forces" is of the most intimate character, as also the President who is commander in chief of the Army, similarly amenable, appeared to me so extraordinary, that, believing it to have been issued through some oversight, I informally requested the Attorney General to reconsider the question passed upon. This he readily consented to do, and—as I have been informed—had done so in part, when he went out of office. His opinion, therefore, of June 2, 1876, remains unrevoked.

[It may be noted here that Barth escaped from the military arrest, and has since been at large. The State Department has recently been requested by the Secretary of War to procure his extradition from the Hawaiian government.]

3. In view of the facts thus detailed, I have the honor to request, and, in view of the importance of the question of constitu-

tional law involved, to urge, that the Secretary of War will renew the reference to the Department of Justice of the question of the amenability to the military jurisdiction of Superintendents of National Cemeteries, originally submitted by the Hon. Secretary to the Attorney General on Dec. 6th last, but on which no opinion has yet been given: And further that he will request at the same time a review of the opinion relating to the case of Barth, and a further opinion therein, in case it should be deemed proper to withdraw the existing one.

By a reference to Secretary Cameron's said communication to the Attorney General of Dec. 6, 1876, it will be seen that he requested in substance that the two cases should be considered together, and an opinion be furnished upon both, in connection and at the same time.

A brief memorandum of authorities upon the question of jurisdiction above indicated is herewith furnished; as also Remarks upon the Argument of Genl. Schofield in the case of Barth.

I have the honor to remain
Very respectfully
Your obt. svt.,
W. M. DUNN,
Judge Advocate General.

MEMO. OF AUTHORITIES

"Under the Constitution of the U. S., (See Amendments—Arts. V & VI,) Con-

gress has no power to subject any citizen of a state to trial and punishment by military power in time of peace." Atty. Gen. Hoar) XIII Opinions of Attys. Gen. 63.

In XIV. Opinions, 22–24, Atty. Gen. Williams construes the 63d (then numbered the 60th) Article of War as referring to a time and theatre of war, and holds civil employees serving with the troops in an Indian war, amenable to the military jurisdiction, under this Article. The inference is that employees not so serving, (but serving in time of general peace, and—even if Indian hostilities were going on at the time—at a place not in the "field" but wholly remote from the theatre of any hostilities,) cannot legally be made so amenable.

In Stuart *v.* United States, 18 Wallace, 84, 88, it is held that a contractor for transportation of military stores from post to post "remote from the seat of actual war," was not performing a military service, and was no part of the Army. (And see reference to this case in 10 Ct. of Claims, 419.)

The only adjudicated case known to me in which the jurisdiction of a military court over a civilian clerk or employee is sustained, is that of *Matter of John Thomas*, U. S. Dist. Ct. for the Southern Dist. of Mississippi, 1 Chicago Legal News, 245. Thomas was a clerk to an Army paymaster. I think, of course that the ruling holding him amenable to trial by court martial was entirely unsound, but I believe that it was in a considerable degree in-

fluenced by the fact that Mississippi was at the time under a military government, under the Reconstruction Laws, and the party was viewed thus—erroneously as I think—as practically serving in the field.

[The ruling in U. S. v. Bogart, 3 Benedict, 257, proceeded on the view that a paymaster's clerk in the *Navy* was a regular uniformed officer of the Navy, having rank as such, &c., and thus not a civilian at all. This case is therefore not in point.]*

In General Schofield's argument he refers to the phraseology of the present 60th Article of War—"any person in the Military service of the United States," as if it extended the military jurisdiction to persons other than officers and enlisted men. In my opinion, this phrase is simply to be regarded as a condensed form of expression for the phrase employed in the original Act, (Mch. 2, 1863, ch. 67, sec 1.)—"any person in the land (or naval) forces of the United States, or in the militia in actual service of the United States in time of war." By these words Congress clearly intended the officers and

*If it be held that Barth is or was amenable to military jurisdiction and trial, then every clerk in the War Department at Washington, male or female, is so amenable: the same may also be, with equal reason, held of the Secretary of War, whose relations to the land forces are closer than can be those of any clerk in Quartermaster or any other branch of his Department; and may be held also of the President who is commander in chief of the Army!

soldiers of the army (including militia when regularly called into the United States service,) and the officers and seamen of the navy. The Commission on the Revision of the Statutes were not authorized to change the existing law, but they could condense and simplify, and, in my opinion, this is all that they have done in the present 60th Article; the term now employed being merely a brief form of the more elaborate form, but each being simply a description of the purely military force of the United States, composed of officers and enlisted men. A similar condensation of expression occurs in the corresponding Article of the Naval Code.

I am—further—wholly unable to perceive the bearing, upon the present question, of the "or other person," etc., cited by General Schofield from the clause before the last of the 60th Article. I construe this as making punishable officers or soldiers who may purchase, etc., the articles mentioned from other officers or soldiers, or from any of the class of civil persons commonly employed in connection with armies, as teamsters, officers servants, camp-followers, etc. I consider the provision to have no more significance in referance to the question at issue than if, instead of the expression, "or other person," etc., the Article had said—*or from any civilian.* To illustrate: Suppose an Act of Congress should provide that if a soldier committed an assault upon a citizen of the United States, he should be tried by court martial, and punished in

a certain way. In my opinion there would be just as much reason for holding that under this Act the citizen could be tried by court martial and punished as prescribed for committing an assault upon the soldier, as for holding that the clause indicated of the 60th Article furnishes any color of authority for the trial by court martial of a civilian clerk situated as was Barth.

I cannot therefore perceive that the Revised Statutes make any change whatever in the law as to the particular under consideration. But even if they did; even if in a hundred Articles or provisions they in terms authorized the trial of civilians by court martial, such a trial would still be utterly illegal because in contravention of the letter and spirit of the Constitution. The question is thus a constitutional, not a statutory one. At the same time I am unable to discover in the Statutes any attempt whatever to contravene the Constitution in this respect.

W. M. DUNN,
Judge Advocate General.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,
June 16, 1877.

HON. GEO. W. McCRARY,
Secretary of War.

SIR: I have the honor to return herewith the papers referred to this Bureau in the case of Wm. G. Crafts, and to express the

opinion that such case is not within the jurisdiction of a court martial, and that the prisoner is entitled to be immediately released by the military authorities, or committed to the custody of the U. S. Marshal.

This Bureau has always been of opinion that the military jurisdiction cannot legally be extended to a case of a civilian except upon the rare and extraordinary occasion of a state of war or of the existence of martial law, and then only for crimes committed upon the theatre of war or within the scope of such law. The 63d Article of War is deemed to recognize this principle, in providing that retainers to the *Camp* and persons serving with the *armies in the field*, though not enlisted soldiers, shall be subject to military law; thus evidently limiting such amenability to civil persons serving with troops engaged in actual war, and for offences committed upon its theatre.

The within named civilian, Wm. G. Crafts, was, at the time of his offences, not serving with an army in the field, but was a clerk to an officer acting as quartermaster stationed at a military post, within the limits, not of a Territory but of a State—Nebraska. This post is designated "Camp Robinson," but it is not a camp in a warlike sense, but a permanent station, having been established for at least three years. The locality of the post was not within the theatre of an Indian war; nor were the troops at or near the post engaged

in war. The Indians at Red Cloud Agency, near by, were not at war with the United States.

The statement in the papers relied upon as giving the court martial jurisdiction is that—"the troops stationed at that post were "operating 'in the field' in the immediate presence of various bands of "Indians, many of whom were lately from the war path." This statement is a mixture of inference with fact. While it is no doubt true that some of the Indians at the Agency had recently been in hostility with the United States, it is a conclusion only of the writer that the troops stationed at the post were "operating in the field." But if indeed "operating," in the restricted sense of guarding the frontier and holding themselves in readiness to repell any disorder at the Agency, or to march against inimical Indians in the event of war or active hostilities, they were not, in the opinion of this Bureau, so engaged in actual warfare as to authorize courts martial convened at their station to take cognizance of offences committed by civilians there commorant.

It is to be remarked that not only is the right of a civilian to be tried by the civil courts one which cannot constitutionally be infringed upon except under circumstances most clearly and indubitably subjecting him to military law and government, but the theatre of an Indian war is necessarily peculiarly limited, being confined to the locality of the particular tribe or tribes at

war with the United States. The military jurisdiction in a case like the present, is thus to be more cautiously extended than in the case of a general war.

It is further to be observed that even if the jurisdiction of a court martial could legally have been stretched so as to include this case at the date of the alleged offences, March 31, it would be too late to exercise such a jurisdiction now when hostilities with Indians within the Department of the Platee have almost ceased, and a state of war can scarcely be said to exist there except so far as relates to certain distant roving bands. The jurisdiction of a court martial under the 63d Article can, it is held, be exercised only pending the war, during and upon the scene of which the offence was committed.

It is thus the opinion of this Bureau that no sufficient authority is shown for subjecting the civilian named to the exceptional jurisdiction of a military court. His offences—conspiring with contractors, &c, to defraud the United States—were not military ones, but such as are clearly cognizable, under Sec. 5438, Revised Statutes, by the U. S. District Court, which meets at Omaha, (the entire State of Nebraska being included within the judicial district,) on October 10th next. The recommendation of this Bureau would therefore be that the papers in the case be transmitted to the Department of Justice, with the request that the necessary instructions be given for

the arrest of the prisoner by the Marshal and his prosecution before said Court.

In view however of the opinion of Attorney General Taft in the case of Barth, of June 2d, 1876, which the Judge Advocate General, believing it to have been inadvertently issued, has heretofore desired the Secretary of War to ask to have reconsidered, it is urged that the Hon. Attorney General be requested to furnish the Secretary of War with an opinion as to whether a court martial may legally assume jurisdiction of the case of the within named civilian clerk, Wm. G. Crafts.

W. M. DUNN,
Judge Advocate General.

APPENDIX C

U. S. CITIZENS WORKING FOR AND WITH THE DEPARTMENT OF DEFENSE IN FOREIGN COUNTRIES

(Excluding Territories and Possessions)
As of 31 December 1956

(Estimated)

SUMMARY

Total	1,186,445
Military	731,623
Civilian	454,822
Civilian Components	(37,971)
Dependents	(416,851)

Detail

	Number	Number of dependents
U. S. Military Personnel	[1] 731,623	395,413
DOD[a] Civilian Employees	[2] 23,282	[3] 17,447
Technical Representatives (Highly Skilled)	1,635	[4] 700
Contractors' Employees	[5] 4,500	[5] 2,000
USO Employees	25	25
American Red Cross	664	66
Army-Air Force Exchange & Motion Picture Service	2,006	[5] 1,000
Military Sea Transport Service	[5] 5,400	—
Special Services	459	[5] 200

[a] Department of Defense.
[1] Includes 112,156 afloat.
[2] 31 January 1956 figure.
[3] Afloat.
[4] Estimated from existing ratios.
[5] Plus others—unknown.

APPENDIX D

Delegates With Military Experience Who Participated in the Constitutional Convention of 1787 (35 Out of 55)

New Hampshire

John Langdon. Captain of militia.
Nicholas Gilman. Captain.

Massachusetts

Rufus King. Aide to Gen. Glover.

New York

Alexander Hamilton. Aide-de-Camp to Washington. Lt. Colonel.

New Jersey

William Livingston. Appointed brigadier-general of New Jersey militia, 1776.
David Brearly. Lt. Colonel. Served after war as colonel of militia.
William Paterson. "He was an officer in the Somerset County Battalion of minute men * * * ".
Jonathan Dayton. Captain at Yorktown.

Pennsylvania

Thomas Mifflin. Washington's aide-de-camp and quartermaster-general of the Continental Army.

George Clymer. Captain of volunteers in Gen. Cadwalader's brigade.

Thomas Fitzsimons. "Raised and commanded a company of militia."

James Wilson. Elected Colonel of 4th battalion of Cumberland County associations, May 3, 1775. Never in active service. May, 1782, became brigadier-general of militia.

Delaware

Gunning Bedford, Jr. Aide to Gen. Washington. (Not confirmed in the records, but stated by daughter in her will.) (Rank not given.)

John Dickinson. "Temporarily he appears to have served as a private in a special force raised in that colony (Delaware) which took part in the battle of Brandwine." Later commissioned a brigadier-general of Delaware militia.

Richard Bassett. "Captain of a troop of Dover Light Horse."

Maryland

James McHenry. Surgeon of Col. Robert Magaw's 5th Pennsylvania Battalion. Later "Senior surgeon of the Flying Hospital, Valley Forge." Secretary to Washington.

Virginia

George Washington. General Commander-in-Chief of Continental Army.

North Carolina

William Blount. Paymaster. No rank given.

Richard D. Spaight. Aide to Gen. Richard Caswell, Commanding the state militia. No rank given.

Hugh Williamson. Surgeon General of North Carolina state troops.

South Carolina

Charles C. Pinckney. Aide to Washington. Brigadier-general.

Charles Pinckney. Lieutenant of the Charlestown (Charleston), S. C., Regiment of militia.

Pierce Butler. Major of N. M. 29th Reg. (Ireland). Resigned 1773. (Adj.-Gen., S. C., 1779.)

Georgia

William Few. Lt. Colonel.

Abraham Baldwin. Chaplain. No rank given.

Sources: *Dictionary of American Biography, National Cyclopaedia of American Biography.*

MILITARY PARTICIPATION IN THE AMERICAN REVOLUTION BY DELEGATES TO THE CONSTITUTIONAL CONVENTION OF 1787 WHO DID NOT SIGN THE CONSTITUTION

New York

John Lansing. Military secretary to General Philip Schuyler, 1776–1777.

New Jersey

William C. Houston. Captain of the foot militia of Somerset County, N. J.

Maryland

John Francis Mercer. Lt. Colonel.

Virginia

Edmund Randolph. Appointed aide-de-camp by Washington in August, 1775. Returned to Williamsburg in 1776.

George Wythe. Volunteered for army when hostilities began, but almost immediately, sent to Congress.

James McClurg. Surgeon in Virginia militia. Referred to frequently in the records as physician-general and director of hospitals for the state.

North Carolina

Alexander Martin. Colonel.

William R. Davie. Commissary-General.

Georgia

William Leigh Pierce. Aide-de-camp to General Greene. Left the army as a brevet major in 1783.

John Houstonn. As governor of Georgia, he personally commanded a force of 350 Georgia militiamen in a military effort against St. Augustine, Florida. Expedition failed.

Source: *Dictionary of American Biography.*

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Nos. 701 and 713—October Term, 1955

In the Supreme Court of the United States

OCTOBER TERM, 1956

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, W. VA., PETITIONER

v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR APPELLANT AND PETITIONER FOLLOWING REARGUMENT

J. LEE RANKIN,
Solicitor General,
ROGER FISHER,
Assistant to the Solicitor General,
Department of Justice, Washington 25, D. C.

GERALD G. BARTON,
First Lieutenant, USAR,
Office of the Judge Advocate General,
United States Army, Washington 25, D. C.

Except for the brief period under the statute of 1799, at which time persons in the Navy were subject to court-martial for murder committed within the United States, the 1863 statute was the first to make murder *within the United States* subject to trial by court-martial. Since 1800, however, murders committed *outside the United States* by persons connected with that branch of the armed services which was most frequently outside the United States—*i. e.*, the Navy—have been subject to trial by court-martial.

V

THE GOVERNMENT'S POSITION IS THAT CONGRESS HAS AUTHORITY TO MAKE A MILITARY DEPENDENT SUBJECT TO COURT-MARTIAL JURISDICTION WHEN "IN THE FIELD"

The Chief Justice asked the Solicitor General whether, in the Government's view, wives of soldiers based in the United States could be tried in the United States by court-martial. The Solicitor General replied that it was a "question of whether they are in the field" and indicated that Congress would have the constitutional power to subject dependents to court-martial jurisdiction under appropriate circumstances. In view of the apparent misunderstanding of the Government's position by defendants' counsel * we would like to make a brief clarification of the answer to the Chief Justice's question.

---

* "Then I must confess I was amazed when the Solicitor General said that it is only a question of legislative judgment that any time Congress wants to subject the good ladies at Fort Myer to trial by courts martial, they can do so." Ward and Paul transcript, p. 70.

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II. As of December 31, 1956 there were an estimated 8,092 dependents and civilian employees accompanying the Armed Forces in Italy 7

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IV. Since 1799 the United States has had laws authorizing the trial by court-martial of certain classes of persons for the crime of murder 11

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CITATIONS

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Rev. Stat. § 1342 5

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2 Stat. 359 5

2 Stat. 759 12

12 Stat. 602 13

12 Stat. 731 13

39 Stat. 655 5

41 Stat. 793 5

Articles of War:

Articles of War, adopted by the Continental Congress, on June 30, 1775, 2 J. Cont. Cong. 111; Winthrop, pp. 956-957):

Art. XL 3

LIV 3, 5

It is the Government's position that the constitutional power to make rules for the government and regulation of the land and naval forces gives Congress the power to make subject to court-martial jurisdiction those categories of persons who were then subject to court-martial jurisdiction, under comparable circumstances, and other persons reasonably necessary and proper to the government of those forces. Since wives and other retainers to the camp were then subject to court-martial jurisdiction when in the field, the constitutional power incorporates the then existing concept of "in the field". As demonstrated in our reply brief on rehearing (pp. 41–61), the concept of "in the field" turned on the non-availability of civil courts and on the military posture of a force; prior to 1867 it was never deemed limited to times of hostilities.

In our reply brief on rehearing we stated (p. 56):

> And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that—barring unusual circumstances—it was no longer possible to be "in the field" in the United States.

It is the Government's position that Congress has the power to subject dependents within the United States to court-martial jurisdiction when "in the field", but that in view of the present general availability of civil courts throughout the United States it would only be under unusual circumstances—such as invasion, internal chaos, or where the courts were closed

Statutes and Articles of War—Continued

Articles of War—Continued Page

Articles of War of 1776, adopted by the Continental Congress on September 20, 1776, 5 J. Cont. Cong. 801–802, Winthrop, pp. 968–969):

Sec. XIV.

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Articles of War enacted May 31, 1786, 30 J. Cont. Cong. 319; Winthrop, p. 973:

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Winthrop, *Military Law and Precedents*, 2d ed. (1920):

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v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR APPELLANT AND PETITIONER FOLLOWING REARGUMENT

During the course of the oral reargument of these cases on February 27, 1957, the Court asked the Solicitor General various questions and requested him to supply the desired information to the Court in memorandum form. This memorandum is submitted in response to those requests.

For the convenience of the Court, we have also incorporated in this memorandum, in printed form, as the first Point, the supplemental memorandum submitted to the Court in mimeographed form on the day of the reargument.

I

ACTS OF THE CONTINENTAL CONGRESS SUBJECTING CIVILIANS TO TRIAL BY COURT-MARTIAL FOR CONDUCT BEFORE A COURT-MARTIAL

The Government's reply brief on rehearing (pp. 58–60) pointed out that on May 19, 1786, the Continental Congress struck language which would have restricted court-martial jurisdiction over persons who refused to testify before a court-martial to those belonging to the forces of the United States. This action was cited to show that the Continental Congress took a broad view of the reach of court-martial power and was willing to subject civilians with a very limited connection with the military to court-martial jurisdiction.

Defendants in their *Further Memorandum*, filed with the Court February 26, 1957 (pp. 2–3), suggest that the legislative action to which we refer did not constitute the adoption of a statute, and they make the further categorical statement that there never was any such statute. However, as we shall now show, the facts are that the Continental Congress repeatedly adopted Articles of War subjecting civilians to trial by court-martial for conduct occurring in the presence of a court-martial, and that the very statute which defend-

ants say never existed was adopted by the Continental Congress and was in effect for eleven years.

The first American Articles of War, adopted by the Continental Congress on June 30, 1775, contained the following two articles authorizing the trial by court-martial of civilians for conduct in the presence of a court-martial:

> XL. *No person whatsoever* shall use menacing words, signs, or gestures in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceeding, on the penalty of being punished at the discretion of the said court-martial. [Emphasis added]
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> * * * * *
>
> LIV. *All persons* called to give evidence, in any case, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the direction of such court-martial:—. . . [Emphasis added] [2 J. Cont. Cong. III; Winthrop, pp. 956-957][1]

The American Articles of War of 1776, adopted by the Continental Congress on September 20 of that year, contained two similar articles, also subjecting civilians to court-martial jurisdiction. These were Articles 6 and 14 of Section XIV:

> Art. 6. *All persons* called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for

[1] Article XL was apparently based on Article 16 of the British Articles of 1765 (see Winthrop, p. 944); Article LIV was apparently based on Article 53 of the Massachusetts Articles of War adopted on April 5, 1775 (see Winthrop, p. 952).

such refusal, at the discretion of such court-martial: . . . [Emphasis added]

* * * * *

Art. 14. *No person whatever* shall use menacing words, signs, or gestures, in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial. [Emphasis added] [5 J. Cont. Cong. 801–802; Winthrop, pp. 968–969]

These Articles of 1776 were in effect on May 19, 1786, when the vote in the Continental Congress to which we referred in our reply brief on rehearing (pp. 58–60) took place. On that day, the Continental Congress considered the following proposed paragraph:

> That all persons *belonging to the forces of the United States,* called to give evidence in any cause before a court martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court martial. [30 J. Cont. Cong. 290, emphasis added]

With the exception of the italicized phrase, this paragraph was identical with Article 6, Section XIV, of the Articles of War then in force, *supra.* The proposal being debated on May 19th was one which would have *reduced* court-martial jurisdiction over civilians by restricting the Article's operation to servicemen. The Continental Congress, however, on that day voted to strike the proposed italicized phrase.

With the exception of the tally of the votes, the full account of this incident as it appears in the Journal

of the Continental Congress is reprinted on page 59 of our reply brief on rehearing. We have made a search and found no further material bearing directly on that particular action of the Continental Congress.

However, twelve days later, the Continental Congress repealed the entire Section XIV of the then Articles of War and adopted new Articles to replace it. No Article along the lines of the one debated on May 19th (or previously included in the Articles of War as Article 6 of Section XIV) was included, but the Articles did include the following:

> Art. 12. *No person whatsoever* shall use menacing words, signs or gestures in the presence of a court-martial, or shall cause any disorder or riot to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial. [Emphasis added] [30 J. Cont. Cong. 319; Winthrop, p. 973]

Authority to punish civilians for such contempt was continued in every set of Articles of War adopted during the succeeding hundred and fifty years. 2 Stat. 359; Rev. Stat. § 1342; 39 Stat. 655; 41 Stat. 793.

The special significance of the vote of the Continental Congress on May 19, 1786, is that the Congress heard, debated, and rejected a specific proposal which would, in one area, have limited court-martial jurisdiction to those belonging to the armed forces. This vote, taken in peacetime, was to the effect that civilians, too, should continue to be subject to trial by court-martial for refusing to testify. It makes no difference whether the action of the Congress on that

day be considered as operative legislation or not. At the end of that day, the law stood, as it had for eleven years since the 1775 Articles were adopted, that civilians were subject to trial by court-martial for refusing to testify. As the Attorney General later said, "The terms of this article are broad enough to include civilian witnesses, and it was doubtless meant to apply to them." 18 Op. Atty. Gen. 278, 280. See Winthrop, p. 309, fn. 84.

Thus, defendants are wholly mistaken in Point I[2] of their *Further Memorandum* and in their categorical statement that:

> . . . *there never was any such law or statute as the Government sets forth*, with or without the disputed words. [*Further Memorandum*, p. 3.]

The Continental Congress in 1775, and again in 1776, adopted the very language discussed. In 1786, when that statute was still in effect, the Congress voted to strike language which would have restricted the Article's operation to servicemen, and left the Article as it then existed. Moreover, in 1775, in 1776, and again in 1786, the Continental Congress voted laws which made civilians subject to court-martial for various categories of contemptuous conduct committed in the presence of a court-martial.

In sum, in direct contradiction to the defendants' position, the fact is that the Continental Congress repeatedly voted in favor of subjecting civilians to

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[2] Point I is headed: "The Continental Congress Passed No Act Subjecting Civilians to Trial by Court-Martial for Refusal to Testify."

court-martial jurisdiction for conduct before a court-martial. As we have pointed out, in our reply brief on rehearing, this action demonstrates that, at the time the Constitution was adopted, there was a willingness on the part of the Confederation to have the legislature subject civilians where there was a reason to do so and a sufficient connection with the military to court-martial jurisdiction.

II

AS OF DECEMBER 31, 1956, THERE WERE AN ESTIMATED 8,092 DEPENDENTS AND CIVILIAN EMPLOYEES ACCOMPANYING THE ARMED FORCES IN ITALY

In connection with the discussion of the practical problems that would be involved in returning all accused civilians to the United States, Justice Black asked how many American civilians there were in Italy.

Appendix C, page 100, of our reply brief on rehearing, gives the estimated total number of civilians accompanying the armed forces in foreign countries as of December 31, 1956, broken down into categories. Figures are available giving the breakdown by countries for the dependents of the military, for the civilian employees, and for the dependents of the civilian employees. Country-by-country figures are not available for the smaller categories of civilians such as technical representatives, American Red Cross personnel, etc. Personnel are constantly in flux, and it is impossible to be precise. The following table gives the best available data as of December 31, 1956, for the number of civilian employees, military dependents

and civilian dependents in those foreign countries which have over 100 such civilians. It will be noted that in Italy there were some 8,092 civilians consisting of 340 civilian employees, 7,547 military dependents and 205 dependents of civilian personnel.

DEPARTMENT OF DEFENSE

CIVILIAN AND DEPENDENT PERSONNEL BY GEOGRAPHIC LOCATION

Estimated as of 31 December 1956

	Dependents of military	Civilian employees	Dependents of civilians	Total
Germany	162,811	5,467	5,238	173,516
Japan	68,928	6,767	5,112	80,807
United Kingdom	46,614	1,129	395	48,138
France	38,365	2,465	1,208	42,038
Philippines	12,827	519	765	14,111
Ryukyus (Okinawa)	9,929	2,036	1,120	13,085
French Morocco	8,477	1,149	775	10,401
Canada (including Newfoundland and Labrador)	7,863	356	273	8,492
Italy	7,547	340	205	8,092
Bermuda	4,676	393	318	5,387
Libya (Tripoli)	4,514	351		4,865
Spain	3,904	504	358	4,766
Cuba	2,651	232	312	3,195
Formosa (Taiwan)	2,816	23		2,839
Turkey	2,521	142	52	2,715
Azores	2,146	192	306	2,644
Greece (and Crete)	1,231	62	98	1,291
Iceland	191	236	317	744
Iran	431	86		517
Korea	160	353		513
Eritrea	469	21		490
Belgium	392	36		428
Norway	296	24		320
Netherlands	233	29		262
Saudi Arabia	160	29		189
Greenland	140	36		176
Denmark	141	20		161
Pakistan	33	122		155
Portugal	140	12		152
Viet Nam	128	11		139
Venezuela	123	1		124

III

DEPENDENTS ACCOMPANYING THE ARMED FORCES OVERSEAS HAVE COMMITTED A NUMBER OF SERIOUS AND SEMI-SERIOUS OFFENSES REQUIRING THE EXERCISE OF CRIMINAL JURISDICTON

The Chief Justice requested data as to the number of serious and moderately serious cases tried by court-martial which involved dependents, as distinguished from those involving other civilians.

Since 1953, there have been four court-martial trials of dependents for murder; of which two are the cases now before the Court. Of the remaining two, one resulted in an acquittal and one in a sentence of life imprisonment.

The remaining offenses discussed below occurred during the two-year period 1955 and 1956. For this period records are available not only for the general courts-martial but for the lesser courts-martial as well.[1]

There was one trial for voluntary manslaughter in which the two-year sentence was disapproved on review. There was a trial in Germany last year by general court-martial for assault with intent to commit murder. The dependent was found guilty and sentenced to one year's confinement. There have been

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[1] Some records for previous years have been destroyed; others are filed in the Kansas City records depot among general personnel records. In view of the large number of man-days that would be required to locate such records of dependent trials (the Army estimated that one-and-a-half million linear feet of files would have to be searched), it was decided not to endeavor to collect records for years prior to 1955.

three trials by general court-martial for aggravated assault, of which one involved a shooting. These resulted in two acquittals and one six-months' suspended sentence.

In September 1956, a dependent wife was tried by general court-martial in French Morocco for a conspiracy to defraud and for defrauding the United States. The wife had engaged in business as a representative of an automobile agency and wrongfully arranged to have cars brought over at government expense. She was fined $2,000 and confinement until paid, not to exceed six months.

Two minor dependents were tried by court-martial and found guilty of wilfully setting fire to real and personal property. They were each fined $500, reprimanded, and given a six months' suspended sentence.

The following table gives the number of less serious cases in which dependents were tried by court-martial during the two-year period 1955–1956:

Assault and battery (including assault on local citizens)	4
Black market activities	11
Breach of the peace	1
Drunk and disorderly	2
Hit and run driving	1
Drunken driving	3
Reckless driving	1
Driving without a license	4
Speeding	4

The bulk of offenses committed by dependents are dealt with administratively, which accounts for the relatively low rate of criminal trials for this group. The offenses tried by court-martial represent the "hard core" cases for which administrative action has

been deemed inadequate.[4] One other factor should be mentioned. In view of the non-availability of confinement facilities for women overseas, the Army has a fixed policy against short sentences of confinement for women, whether in the service or out. Under this policy, no confinement of less than a year will be approved. AR 600–325, April 16, 1951. Because of this policy, there is a tendency not to court-martial wives except for the most serious offenses, unless it is thought that administrative action would be inadequate and that a fine would be effective.

IV

SINCE 1799 THE UNITED STATES HAS HAD LAWS AUTHORIZING THE TRIAL BY COURT-MARTIAL OF CERTAIN CLASSES OF PERSONS FOR THE CRIME OF MURDER

During the course of the oral argument, Mr. Justice Black inquired of the Solicitor General as to the date when the laws of the United States first authorized trial by court-martial for the offense of murder.

The history of the United States laws subjecting persons to trial by court-martial for murder illustrates that one cannot draw valid conclusions as to the extent of court-martial jurisdiction outside the United States by considering the law applicable within the United States; military jurisdiction has consistently been greater where United States civil jurisdiction was not available.

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[4] That trial by court-martial is used only as a last resort is demonstrated by the disposition of cases arising under foreign law for which the United States has obtained waivers of jurisdiction. Of the 417 such cases last year referred to in our reply brief on rehearing (pp. 66, 69), over 400 were handled administratively.

The Act of March 2, 1799, *An Act for the Government of the Navy of the United States* (1 Stat. 709, 712), established the system of naval courts-martial and provided:

> All murder shall be punished with death.

A year later, on April 23, 1800, new Articles were adopted for the government of the Navy (2 Stat. 45, 48). The Article dealing with murder made two substantial changes. The first of these was to limit the scope of the Article so as not to apply to murders committed within the territorial jurisdiction of the United States where, presumably, civil jurisdiction of the state courts was available. The second change was to expand the court-martial jurisdiction over murder committed outside the territory of the United States so that civilians belonging to government ships, as well as members of the Navy, would be subject to trial by court-martial. The text of the Article is given on page 48 of our reply brief on rehearing.[*]

On June 26, 1812, Congress passed a statute covering the punishment of offenses committed on board private armed vessels during the then-current hostilities (2 Stat. 759). Under this Act, murder committed outside the territorial jurisdiction of the United

[*] As pointed out in that brief, civilian seamen on board revenue cutters, as well as members of the Navy, were subject to trial by *naval* court-martial for murder committed outside the territorial jurisdiction of the United States. In view of this fact, defendants' statement that the "[U. S.] Revenue Cutter Service . . . had no courts-martial of any kind" until 1906 (*Further Memorandum*, p. 10) must be taken with caution. Defendants are obviously not referring to *naval* courts-martial, as distinguished from *Coast Guard* (or *Revenue Cutter Service*) courts-martial.

States by an officer or seaman on board such a private vessel was made subject to trial before a naval court-martial. See 1 Op. Atty. Gen. 177, discussed in our reply brief on rehearing, pp. 49–50.

On July 17, 1862, revised Navy articles were adopted, Article 5 reading as follows (12 Stat. 602):

> 5. The crime of murder, when committed by an officer, seaman, marine, or other person belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court-martial.

This statute made it explicit that the court-martial jurisdiction over murder committed on public vessels outside the territorial jurisdiction of the United States applied to *any person* belonging to the vessel.

The statute to which Mr. Justice Black referred at the oral argument is that of March 3, 1863 which provided that in time of war, insurrection, or rebellion, murder and other felonies committed by persons in the military service were subject to trial by court-martial (12 Stat. 731, 736). Winthrop (p. 667), explains that this statute was itself designed to meet the problem of the unavailability of American civil courts:

> * * * Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.

because of extreme emergency—that troops would be "in the field" within the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 701, Oct. T. 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal From the United States District Court for the District of Columbia

No. 713, Oct. T. 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF ON REHEARING ON BEHALF OF APPELLEE AND RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 701, Oct. T. 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal From the United States District Court for the District of Columbia

No. 713, Oct. T. 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF ON REHEARING ON BEHALF OF APPELLEE AND RESPONDENT

INTRODUCTORY STATEMENT

This supplemental brief is submitted in response to the Court's order for reargument (352 U.S. 901). Considera tions of space, no less than of expense, make it undesirable

to repeat what was fully and indeed exhaustively presented at the last Term. There will, accordingly, be liberal cross-references to the earlier briefs.[1]

The argument that follows will cover not only the questions put by the Court in its order for reargument but also the points that were briefly outlined in the Petition for Rehearing.

SUMMARY OF ARGUMENT

I. A. The territorial sovereign does not confer jurisdiction on the personal sovereign, but simply consents to the personal sovereign's exercise of its own jurisdiction; and the scope of the latter depends, not on the territorial sovereign's consent, but on the personal sovereign's law. Thus, if a ship of Country A is in the territorial waters of Country B, and a homicide is committed on board by a member of the crew, primary jurisdiction belongs to the territorial sovereign, so that the territorial sovereign's claim to trying the offender prevails. *Wildenhus's Case*, 120 U.S. 1. But if the territorial sovereign is content to let the personal sovereign proceed with the trial, the latter can do so, thus establishing that the territorial sovereign's jurisdiction is not exclusive but only primary. *United States* v. *Flores*, 289 U.S. 137. If, however, the personal sovereign's law is insufficient to reach the offense, then the territorial sovereign's consent is ineffective to prevent the offender's going free; that course necessarily follows

[1] They will be hereinafter cited as follows:

Brief for Appellant in No. 701: U.S. Reid Br.
Brief for Appellee in No. 701: Covert Br.
Brief for Petitioner in No. 713: U.S. Kinsella Br.
Brief for Respondent in No. 713: Krueger Br.
Reply Brief for Appellant in No. 701 and Petitioner in No. 713: U.S. Reply Br.
Petition for Rehearing in both cases: Pet. Reh.
Memorandum in Reply to Petition for Rehearing: U.S. Memo.
Supplemental Brief for Appellant and Petitioner on Rehearing: U.S. Supp. Br.

if the courts of the personal sovereign lack jurisdiction of the offense (*United States* v. *Wilthberger*, 5 Wheat. 76) or if the particular court of the personal sovereign lacks jurisdiction of the person (*Toth* v. *Quarles*, 350 U.S. 11). Thus the assumption underlying last June's opinions, that there was a relinquishment of jurisdiction by England and Japan which automatically empowered the United States to try these civilian women by court martial, is shown to be wholly untenable.

B. Moreover, as the legislative history of Art. 2(11), UCMJ, clearly shows, the American military jurisdiction asserted in these cases did not purport to be conditional. The "subject to" clause was intended only as a limitation, to preclude international complications that might otherwise arise. Both the history of the provision and the consistent practice thereunder establish that the jurisdiction asserted was not conditional on the territorial sovereign's consent, but was simply to be limited in the event that the latter objected.

C. Furthermore, if, as a matter of American law, including of course American constitutional law, American courts-martial lack power to try particular civilians, then such courts-martial cannot be granted a wider jurisdiction by treaty or international agreement. This follows from the rule, frequently repeated and never questioned, that no treaty can prevail over specific constitutional guarantees and prohibitions, in this instance the twice guarantged right of trial by jury. The United States cannot conduct its foreign relations in a manner that will violate constitutional guarantees. To the extent that the Court last June rested its conclusions on the international arrangements made with England and Japan, it contradicted its own denial that no question of the legal relationship between treaties and the Constitution was presented.

II. Nothing in the Constitution of the United States authorizes the trial of civilians by court-martial in time

of peace and not in occupied territory; and under this heading it is fundamental that all power exerted by the United States must find a basis in the Constitution.

A. The Clause 14 power "To make Rules for the Government and Regulation of the land and naval Forces" does not reach these cases, howsoever viewed.

1. The English precedents prior to 1789 and our own practice for well over a century thereafter established that the only civilians triable by court-martial are those few who were functionally connected with the forces and who served with them in an area of military operations during periods of actual hostilities. Hamilton's comments in No. 23 of *The Federalist*, fairly and accurately read, do not in any sense support the view that the persons included within "land and naval Forces" were deemed to be a class which could be expanded as the legislative judgment from time to time might determine. Neither the supporters nor the opponents of the new Constitution ever envisaged or imagined such a possibility.

The long course of consistent practice of the military authorities, who adhered strictly to the limits of military jurisdiction known in 1789, fixes in definitive fashion the boundary between military and jury trials as it then existed. This follows from the cases on the effect of contemporaneous constitutional construction, and from the decisions fixing the boundaries of jury trial. It is significant that every attempt to enlarge the scope of military jurisdiction as it was recognized in 1789 has failed. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11.

2. Moreover, nothing in the Necessary and Proper Clause, either as a matter of construction or of application over the years, enlarges the scope of "land and naval Forces" in Clause 14. No one thought so for a minute when the Constitution was adopted, and no military men thought so either for a century after *M'Culloch* v. *Maryland*,

4 Wheat. 316, had demonstrated the potentialities of Clause 18. The reason for both attitudes is plain. Any such enlargement would correspondingly contract the class of civilians who could claim a jury trial. The operation of the Necessary and Proper Clause has never been permitted to erode a single personal liberty guaranteed by the Bill of Rights.

To deprive of the right to jury trial a class of civilians who had that right in 1789 is not a legitimate end, is not within the scope of the Constitution, is twice prohibited by the Constitution, and is wholly inconsistent with the spirit of the Constitution. Cf. *M'Culloch* v. *Maryland*, 4 Wheat. at 421. And that was the holding of *Toth* v. *Quarles*, 350 U.S. 11, 21-23.

3. Significantly enough, the power purportedly conferred by Art. 2(11), UCMJ, under which the present prosecutions were instituted, has never been sought to be constitutionally justified in any legislative discussion. Insofar as it was considered at all by text-writers, it was rested on the language of the Fifth Amendment. That notion was demolished by *Toth*, nor is it now sought to be revived. And the opinions last June did not seek to rest Art. 2(11) on Clause 14, with or without Clause 18.

4. Since civilian dependents admittedly cannot be tried by court-martial in the United States although members of the armed forces can be, the present assertions must rest on the proposition that a dependent accompanying the forces overseas loses his or her civilian status.

That proposition is plainly untenable. It is inherently absurd, because the point of supposed transformation cannot be fixed. It is legally unsound, because the Constitution cannot be divided into clauses that stop at the water's edge and those that are available for export. It is factually unfounded, because such additional overseas amenities as the Government relies on are primarily conferred by foreign countries. And the attempt to semanticize over-

seas civilian dependents into a military status, on the basis of rhetorical conclusions that they are indistinguishable from the forces, breaks down utterly in the face of the provisions of the NATO Status of Forces Agreement under which primary jurisdiction over all offenses committed by civilian dependents is conceded to the receiving states. Thus the United States has solemnly recognized a distinction which according to arguments now presented does not exist.

B. The now abolished consular jurisdiction, considered in *In re Ross*, 140 U.S. 453, on which so much reliance was placed last June, does not support the present trials by court-martial.

1. American consular jurisdiction in non-Christian countries was based essentially on force. It was gradually abandoned, and in 1956 it was finally abolished as unsuited to modern conditions. Yet, ironically enough, this Court relied upon that "well-found historical jurisdiction" in the same year to justify trials by court-martial that it was not prepared to rest on the power to govern the armed forces.

The consular jurisdiction cannot be sustained on the basis stated in *Ross*, 140 U.S. at 464, that "The Constitution can have no operation in another country", for the reason that, very plainly, "The Constitution of the United States is in force * * * wherever and whenever the sovereign powers of that government is exerted." *Balzac* v. *Porto Rico*, 258 U.S. 298, 312. Nor can it be sustained on the ground that the consul was sitting as a judge of the foreign country; he was not, as he purported to act only as an American officer, punishing for a violation of American law. The only basis for sustaining the non-jury aspect of the consular jurisdiction is that it dated from 1786-1787, that it was thus pre-constitutional, and that it was accordingly impliedly excepted from the Sixth Amendment. But that is also the reason why these women cannot be tried by court-martial; they had a right to jury trial in 1789 and before.

2. Unlike consular jurisdiction, which rested on express treaty provisions, extraterritorial jurisdiction over military personnel flows from accepted doctrines of international law. It was so held in *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 139-140; many other countries agreed; and prior to 1953 the United States always so contended and obtained immunity for its overseas troops accordingly. While the doctrine of military extraterritoriality was not always consistently recognized by great powers in dealing with weaker ones, it is plain that such military extraterritoriality as is conceded does not involve in any aspect a cession of jurisdiction by the territorial sovereign to the personal sovereign. Both prosecutions here were brought by the United States. Therefore, even if the consular jurisdiction is still valid—a point that was not conceded last spring—it could not justify the present trials by court-martial.

C. The courts-martial here involved cannot be sustained as legislative courts.

1. While the decisions in this Court have not always been consistent as to which courts are legislative rather than constitutional, it is plain that, prior to 1956, no one ever thought of a court-martial as a legislative court.

2. A court-martial is an executive court, for two functional reasons: First, it is created by the order of an executive officer; and second, its judgments remain a nullity until they are acted on by such an officer. Both propositions are still true under the Uniform Code. This Court has always had appellate jurisdiction over legislative courts, but it cannot review directly the judgments of military tribunals, because those are executive courts, all of whose proceedings must be reviewed by an executive officer. Courts-martial are not and by their nature cannot be legislative courts.

3. But to assume the contrary for purposes of argument is still unhelpful. Legislative courts are created by Con-

gress in the exercise of some power other than that granted by Article III. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. On that footing and on that assumption, a court martial would be a legislative court created under the Clause 14 power—which simply brings us back to the inquiry, avoided by the Court last June, whether that power extends to these cases.

4. The circumstance that a particular tribunal is a legislative rather than a constitutional court does not automatically dispense with the requirement of a jury in criminal cases. Thus, the courts in Alaska are plainly legislative in nature—but a criminal defendant there is entitled to a jury trial (*Rassmussen* v. *United States*, 197 U.S. 516). The cases relied on last June (*Hawaii* v. *Mankichi*, 190 U.S. 197; *Dorr* v. *United States*, 195 U.S. 138; *Balzac* v. *Porto Rico*, 258 U.S. 298) did not involve legislative courts created by Congress at all. Those defendants were tried in the local courts of Hawaii, the Philippines, and Porto Rico, respectively, in tribunals all of which were already in existence when those islands passed under American sovereignty. And the true basis for sustaining the non-jury trials in all three cases was, as the opinions plainly show, that the common law jury had not formed a part of the new possession's ancient institutions. Those considerations are insufficient to reach a class of American civilians who, in 1789, were triable only by jury.

5. The guarantee of bail has been deemed so fundamental that it was included in the organic laws for the Philippines and Puerto Rico in which provisions for jury trial were not included. Other fundamental guarantees, such as the protection against double jeopardy and against cruel and unusual punishments, have been enforced in those areas. And even the consular courts made provision for bail. But there is no such thing as bail in military law, even under the Code. The authorities relied on last June do not justify this deprivation, which strikingly em-

phasizes the utter inappropriateness of trying civilians by court-martial.

D. No other power or combination of powers conferred by the Constitution supports the asserted jurisdiction.

1, 2. The war power is irrelevant here, for reasons already set forth, and would be unavailing in any event; it does not justify an extension of military jurisdiction over civilians beyond the limits traditional at the time of the adoption of the Constitution. *Ex parte Milligan*, *Duncan* v. *Kahanamoku*, both *supra*. Considerations based on Art. IV, Sec. 3, are similarly irrelevant, since the territory of the United States is not involved.

3. An exertion of Congressional power is frequently said to rest on several powers. But here the Clause 14 power and the treaty power are both individually inadequate; how then can they become sufficient in the aggregate? Even in constitutional law, the whole cannot be greater than the sum of its parts.

E. The court-martial jurisdiction exercised in the present cases cannot be sustained apart from the power to govern the armed forces. The Court last June avoided inquiry into the scope of that power. But unless the scope of Clause 14 is examined, it is plain that no other power supplies a constitutional basis for these prosecutions.

1. Absent the Clause 14 power, no law made criminal the act for which these women were tried. Ross violated R.S. § 5339 which denounced murder on board an American vessel. All other prosecutions before consuls required a showing that some Act of Congress was being violated. But the only law covering what these women did was Art. 118, UCMJ, which applied only to "Any person subject to this code." Other punitive articles of the Uniform Code are broad enough to reach all persons, whether subject to the Code or not. Consequently in order to render punishable what these women did, it is necessary to show that

they were, as a matter of law, subject to the Uniform Code. No such showing can be made without considering the scope of Clause 14.

2. Moreover, only Clause 14 supports the broad delegation of power to the President to regulate the procedure of courts martial, to prescribe rules of evidence, to define offenses, and to determine elements of criminality. Art. 36(a), UCMJ. This delegation is not troublesome in the case of accused persons in uniform, since the President is their constitutional Commander in Chief. But he is given command power only over the armed forces. Therefore, unless it is first decided that these women can be included within "land and naval Forces" in Clause 14, the legislative powers that the President has in fact exercised in the *Manual for Courts-Martial*, provisions that are shown to have been determinative in the present cases, cannot be sustained. The Constitution does not empower the President so to legislate for the conduct of persons over whom he has no military command.

3. If Congress can subject these women to trial by court-martial in time of peace, it is not bound to extend to them the present statutory safeguards. As recently as the First World War, under the 1916 Articles of War which first purported to subject civilians to trial by court-martial in time of peace, it was perfectly legal to execute some death sentences without appellate review and to require courts martial to reconsider acquittals and light sentences. Even today, there is neither bail nor any right to confrontation at military law; Fourth and Fifth Amendment protections are markedly narrower; and it is not yet clear that military deviations from the constitutional norms established by the civil courts are subject to judicial review. Yet the opinions last June leave unanswered the source of the Congressional power to withdraw so many freedoms from the civilian dependents of servicemen.

4, 5. The military considerations set forth in the opinions last June and now again advanced by the Government

are relevant only to the Clause 14 power the extent of which the Court was unwilling to examine, even though, as the present records show, these trials were not sought to be justified under any other power before the cases were on appeal.

F. Military trial of civilians is utterly foreign to the American tradition; this conclusion is fully documented, beginning with the Petition of Right in 1628. The deviations during the Civil War were momentary, and fully corrected by *Ex parte Milligan*, 4 Wall. 2; nor did any civilian or military lawyer for the rest of the Nineteenth Century find in *The Federalist* or in the Necessary and Proper Clause what the Government first reads into both today. And *Duncan* v. *Kahanamoku*, 327 U.S. 304, reaffirmed the traditional boundaries on broad institutional grounds.

Examination of the present records shows that these women were dealt with far more harshly and unreasonably than they would have been in any American civilian court, and documents the conclusion reached in *Toth* that members of the armed forces are far better qualified for fighting than for judging.

Courts martial are incapable of receiving judicial power over civilians. The argument of necessity now adduced, even if it were factually sound, is essentially one of expediency, against which constitutional protections should be proof. And if "we turn to the words of the Constitution read in their historical setting as revealing the purposes of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes" (*United States* v. *Classic*, 313 U.S. 299, 317-318), then it is plain that the Constitution confers no power to court-martial civilians in time of peace, and that a contrary conclusion does violence to the ideals of the Founders and to the traditions of the Constitution which they wrote.

III. The result reached last June is completely irreconcilable with *Toth* v. *Quarles*, 350 U.S. 11.

A. When habeas corpus was sought on Toth's behalf, he was in Korea. The fact that he was taken there forcibly could not, under familiar principles, affect the jurisdiction of the tribunal which sought to try him. He was in Korea, and was being tried, with that country's consent. Therefore the reasoning of the opinions in the present cases was amply sufficient to justify his trial also, yet his was held to be beyond the constitutional power of Congress.

B. Even if, contrary to the facts, it were assumed that Toth had sought to prevent his being returned to Korea, he would have been contesting extradition to what the Court in these cases has held to be a legislative court. But Congress since 1793 has made provision for extradition to legislative courts, without serious constitutional objection. Here again, the reasoning and the holding of *Toth* cannot be reconciled with the reasoning and the holding in the present cases.

IV. As long as the object sought to be attained is the punishment of crime rather than military control of civilians, practical alternatives are available.

A. These are not cases where "practical necessities" can be determinative. The question is not one of substantive due process, even in an emergency, but concerns the scope of jury trial. The States are free to adopt innovations in criminal procedure, subject only to Due Process limitations; but federal procedures are limited by the Bill of Rights. Therefore, in ascertaining the limits and the incidents of jury trial under the federal Constitution, a showing of reasonableness is not enough; the matter has been placed beyond the reach of legislative judgment.

Moreover, the statements now presented to the Court do not measure up to the requisite standard of trust

worthiness; they are *ex parte, post motam litem*, and obviously self-serving.

B. If the present civilian employees must for military reasons be subjected to military command and military trial, then the obvious and constitutional course is to send only military personnel overseas.

The letters from overseas commanders, that are now presented do not disclose what is found in authoritative legislative materials, viz., that the sole reason why so many civilian employees rather than servicemen are now accompanying the armed forces abroad is purely budgetary.

The letters now presented do not disclose what is found in statistical compilations published by the Government, viz., that as against 23,000 American civilian employees abroad, the armed forces overseas employ directly or indirectly over 350,000 non-American civilians, over whom they have no disciplinary sanctions.

The letters now presented do not establish, what appears to be the fact, that the bulk of the American civilian employees abroad are not in any sense highly skilled technicians.

Thus, the argument of necessity reduces itself to one of simple expediency, which proposes to measure the values of the Bill of Rights by showing that elimination of its protections will effect monetary savings.

C. The civilian dependents cannot be militarized, but their offenses are shown to be so few, as not to present any real problem. Moreover, and this is a highly significant fact that the Government nowhere discloses, under present treaties the United States has already conceded to foreign countries primary jurisdiction over all crimes committed by civilian dependents. NATO Status of Forces Agreement, Art. VII (3). The problem of possible criminal acts by dependents is thus dealt with as are similar

acts by American diplomats, whose offenses are not now punishable by American or foreign law, viz., on a basis of waiver.

D. Ample practical means are available to punish crimes committed abroad by civilian dependents. Primary jurisdiction over such offenses has already been conceded to the foreign countries. To the extent that a waiver can be obtained, the obvious and plainly constitutional course is to provide for a trial in the first judicial district into which the offender is brought. In the air age, this does not present insuperable difficulties. And minor offenders can be dealt with by the deterrent effect of knowing that they will be sent home if they offend.

E. There is no constitutional difference between civilian dependents and civilian employees in time of peace; the precedents show that military jurisdiction is dependent on military status, not on functional connection with the forces.

F. There is similarly no constitutional difference between major crimes and petty offenses; courts martial do not have power to try or punish civilians committing either. The only distinction is the practical one of the appropriate remedy.

V. In any event, even on the assumption that Art. 2(11), UCMJ, is constitutional, Mrs. Covert cannot now be tried by court-martial in the District of Columbia, within the very shadow of the Capitol dome.

A. In deciding last June that "military jurisdiction, once validly attached, continues until final disposition of the case", the Court was more militarist than the military; for the military rule, since 1862, has always been that military jurisdiction ceases whenever military status is terminated by affirmative act of the Government, at any stage of the proceedings. While military jurisdiction is not lost when the soldier's term of enlistment expires or the officer's

commission is terminated by operation of law or the accused escapes, such jurisdiction is destroyed by any affirmative act by the Government that effects a change in status, such as discharge or separation. Here Mrs. Covert, on the assumption made, had a military status only while accompanying the forces overseas; when the United States returned her to this country, it terminated that military status, which had been geographically limited by the terms of Art. 2(11). Even if any intention can properly be attributed to an aggregation of many individuals, the decisions of this Court show that it is the fact of separation from military status, not the intent which may accompany such separation, which is determinative.

B. In any event, by the plain terms of Art. 2(7), UCMJ, further military jurisdictions over Mrs. Covert ceased when she was placed in civilian custody. For, since 1951, Congress has made military jurisdiction in confinement depend, not on the kind of court adjudging the sentence, but on the kind of institution where that sentence is served. The present question does not arise in the case of military personnel, whose status does not change during the appellate process—a further demonstration of the unsuitability of any application of the Uniform Code of Military Justice to civilians.

C. The rationale of last June's opinion in the *Kinsella* case, which sustained the military trials of accompanying civilians overseas on the basis of legislative courts, breaks down when sought to be applied to Mrs. Covert's retrial. For the guarantee of jury trial applies in full force in the District of Columbia, whose courts are moreover constitutional Article III courts. And *In re Ross*, 140 U.S. 453, did not hold that Ross could have been retried by a consul in this country.

ARGUMENT

I. THE CONSENT OF ENGLAND AND JAPAN TO THE EXERCISE OF AMERICAN MILITARY JURISDICTION WITHIN THEIR TERRITORIES IN RESPECT OF OFFENSES COMMITTED THEREIN DID NOT AND COULD NOT INVEST AMERICAN COURTS-MARTIAL WITH JURISDICTION TO TRY PARTICULAR PERSONS

In view of the present posture of these cases, it seems essential to analyze the concepts of jurisdiction that are involved, in order that attention may be focused on what must in the end be the determinative factor, viz., the powers conferred by the Constitution of the United States, and the limitations imposed by that instrument.

A. The Territorial Sovereign Does Not Confer Jurisdiction on the Personal Sovereign, But Simply Consents to the Personal Sovereign's Exercise of Jurisdiction; and the Scope of the Latter's Jurisdiction Depends, Not on the Territorial Sovereign's Consent, But on the Personal Sovereign's Law.

It will clarify consideration of who has jurisdiction—i.e., power—to try whom, if we suppose that a ship belonging to Country A is in the territorial waters of Country B, and that, while in those waters, a homicide is committed on board that ship by a member of its crew. Country B is, by hypothesis, the territorial sovereign; Country A we shall call the personal sovereign.

Case 1. Country B insists on trying the offender in its own courts. Since, clearly, the territorial sovereign has primary jurisdiction, B's claim prevails.

Case 2. Country B is content to let Country A try the offender by the laws of A. If the laws of A reach the offense, A can do so—which proves that the territorial sovereign's jurisdiction was only primary and not exclusive.

Case 3. Country B is similarly content to let Country A try the offender in the courts of A, and such a trial is had.

There, however, it appears that the accused cannot be punished, for one of two reasons: Either the laws of A do not reach the homicide, i.e., the courts of A have no jurisdiction of the offense; or else the particular court in which the offender is brought has no power to try that person, i.e., it lacks jurisdiction of the person. In either event, the defendant goes free. Case 3 thus demonstrates that the territorial sovereign's consent to trial by the personal sovereign does not automatically empower the personal sovereign to punish the offender.

Each of the foregoing situations can be illustrated by decisions of this Court.

Case 1. A Belgian ship is moored to a pier at Jersey City, N.J. While there, one member of the crew kills another member. The State of New Jersey insists on trying the offender. Its jurisdiction prevails over that asserted by the Belgian Consul on behalf of the Belgian Government. *Wildenhus's Case*, 120 U.S. 1.

Case 2. This is the converse of Case 1. An American ship is 250 miles up the Congo River, in Belgian territory, viz., the Belgian Congo. One member of the crew kills another. The Belgian authorities permit the offender to be removed to the United States, where he is placed on trial in a U. S. District Court. *Held*, that the killing is within Criminal Code § 272 (now 18 U.S.C. § 7), that this statute represents an exercise of admiralty and maritime jurisdiction under Art. III, § 2, of the Constitution, and that the offender must accordingly stand trial. *United States* v. *Flores*, 289 U.S. 137. Thus the *Flores* case proves that the territorial sovereign's jurisdiction was only primary and not exclusive. The Government's assumption that territorial jurisdiction is exclusive (U. S. Memo. 3; U. S. Supp. Br. 3, 40) is therefore patently erroneous.

The Court specifically noted (289 U.S. at 159) that the doctrine of *Wildenhus's Case* "does not impinge on that

laid down in *United States* v. *Rodgers*, [150 U.S. 249], that the United States may define and punish offenses committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its jurisdiction."

The *Rodgers* case involved an American ship in the Great Lakes, within Canadian territorial waters, on board of which an aggravated assault had been committed. This Court held that the case was within R. S. § 5346 (later Criminal Code § 276 and now 18 U.S.C. § 443), and that the defendant was triable in a United States Court. *Rodgers* is distinguishable from *Flores* in this, that the offense was probably not sufficiently serious, in the light of the discussion in *Wildenhus*, to confer an acknowledged primary jurisdiction on the territorial sovereign.

Case 3. (a) In February 1819,[2] long before Americans were granted extraterritorial rights in China by the Treaty of 1844 (8 Stat. 592), an American ship is at anchor in Chinese territorial waters. One crew member kills another. The Chinese do not assert their territorial jurisdiction, and the offender is returned to the United States for trial in a federal court. Counsel for the United States argues (5 Wheat. at 82-84): "But China herself disclaims jurisdiction in such cases, and *remands* them to the forum of the offending party. The offence here, being committed by a citizen of the United States upon another citizen on board a merchant vessel of this country, lying in the waters of a foreign country, which expressly disclaims jurisdiction of the case, it is dispunishable, unless it be punishable in the Courts of this country; * * *." *Held*, however, that since no Act of Congress then in force

[2] The date of the offense is taken from the indictment, which is among the records now lodged in the Archives pursuant to the Court's order of May 7, 1956. J. Sup. Ct., Oct. T. 1955, p. 237. The trial took place in October 1819. See *United States* v. *Wiltberger*, 3 Wash. C. C. 515, Fed. Case No. 16738 (C. C. E. D. Pa.).

reaches the offense, the defendant goes free. *United States v. Wiltberger*, 5 Wheat. 76.[3]

(b) An American soldier in Korea kills a Korean. In view of the rule of international law long espoused by the United States, viz., that an armed force in a friendly country with the consent of that country enjoys extraterritoriality as a matter of international law (see pp. 71, 80, *infra*), Korea does not assert jurisdiction. By the time the killing is uncovered, the soldier is a civilian, but an Act of Congress purports to give courts martial jurisdiction to try him none the less. The statute being held unconstitutional, the ex soldier goes free, notwithstanding Korean consent to his trial. *Toth v. Quarles*, 350 U.S. 11.

Both *Wiltberger* and *Toth* thus establish that the territorial sovereign's consent to trial by the personal sovereign does not automatically empower the personal sovereign to punish the offender.

The basic misconception underlying last June's opinion is the view that there was a cession of jurisdiction by Japan (350 U.S. at 473-474, 479) which automatically conferred jurisdiction on a particular American tribunal to try the offense. Such a holding is contrary both to *Wiltberger*, which plainly held that the territorial sovereign's consent did not automatically confer on the personal sovereign jurisdiction of the offense, and to *Toth*, which similarly and necessarily held that the territorial sovereign's consent did not automatically confer on a particular tribunal of the personal sovereign jurisdiction of the person of the accused.

When, as in all the cases discussed, these two included, there is either a concurrent or a *prima facie* concurrent

[3] It was to reach such offenses that Congress passed the Act of March 3, 1825, c. 65, 4 Stat. 115, the provisions of which as carried forward into the Revised Statutes and into the Criminal Code were considered in *Rodgers* and *Flores*, *supra*.

jurisdiction, "There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both." *United States* v. *Flores*, 289 U.S. at 158. As will be pointed out below, pp. 71-80, this lack of entire agreement has extended to the question of jurisdiction over foreign friendly armed forces. But where, as in the two cases at bar, there is complete agreement between the territorial sovereign and the personal sovereign on that score, the scope of the personal sovereign's jurisdiction over the offense and of the competence of a particular court of the personal sovereign over the offender, both depend, as *Wiltberger* and *Toth* demonstrate, not on the consent of the territorial sovereign, but on the municipal law of the personal sovereign. The Government's argument (U.S. Supp. Br. 4, 81-82), which makes the scope of American jurisdiction turn on the extent of the jurisdiction that foreign nations are prepared to confer by treaty, is in consequence completely untenable.

We go on to show, first, that the jurisdiction now asserted was always based on American law, and next that it could not constitutionally be rested on any other foundation.

B. The American Military Jurisdiction Asserted in the Present Cases Did Not Purport to be Conditional on Foreign Consent, But Was Rested on an Assumed American Power.

Another misconception underlying last June's decision is placed in sharp relief by the first sentence of the Court's opinion (351 U.S. at 471):

> "Congress, in Article 2(11) of the Uniform Code of Military Justice, has provided that all persons 'accompanying the armed forces without the continental limits of the United States' and certain named territories shall be subject to the Code *if* such jurisdiction is authorized under 'any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law.'"

The italics have been added to underscore the circumstance that the jurisdiction in question was assumed by the Court to have been conditionally conferred.

But the history and textual development of that provision establish the precise contrary.

First. AW 2(d) of 1916 (Covert, Br. 124) was a flat, unequivocal, and unconditional assertion of military jurisdiction over civilians accompanying the armies overseas.

Second. In the first draft of the Uniform Code, "based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense", proposed Art. 2(11) was in this form (p. 4):

> "(11) All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following territories: * * *"

The commentary (p. 6) read:

> "Paragraphs (11) and (12) are adapted from 34 U.S.C. § 1201, but are applicable in time of peace as well as war. Paragraph (11) is somewhat broader in scope than AW 2(d) in that the Code is made applicable to persons employed by of under the supervision of the armed forces as well as those serving with or accompanying the same and the territorial limitations during peace time have been reduced to include territories where a civil court system is not readily available."

The text as drafted by the Secretary of Defense's Committee was carried into the first bills providing for the UCMJ, H.R. 2498 and S. 857, both 81st Cong., 1st sess., which were simultaneously introduced on February 8, 1949.

The House Commiftee held hearings on H.R. 2498 from March 7 to April 4, 1949 (House Hearings, pp. 565-1307), on April 7 introduced a revised bill, H.R. 4080, in which

the "under the supervision of" clause of Act 2(11) was defeted. In H.R. 4080, Art. 2(11) read in pertinent part as follows:

> "(11) All persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and the following Territories: * * *"

When H.R. 4080 was reported out, on April 28, 1949, Art. 2(11) had been amended to read:

> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the Armed Forces without the continental limits of the United States and the following Territories: * * *"

In the Senate, H.R. 4080 was reported in redrafted form on June 10, 1949, but the only change made by the Senate Committee in Art. 2(11) was the omission of capital letters, and that provision was enacted into law without further alterations.

The "subject to" clause, therefore, is on its face a limitation rather than a condition, and the hearings show that what the Committee desired was to avoid any assertion of American jurisdiction over foreign nationals who would otherwise literally fall within Art. 2(11) and particularly within Art. 2(12).

The problem was not a new one. The British Act of 1942—United States of America (Visiting Forces) Act, 1942 (5 & 6 Geo. VI, c. 31)—had by the proviso to its Sec. 2(1) expressly excepted from the scope of American jurisdiction non-Americans employed by the U.S. forces who were first so employed in the United Kingdom (U.S. Reid Br. 76). And in the hearings on the Uniform Code it was pointed out that the broad language of draft Art. 2(12) —"All persons within an area leased by the United

States" would extend American military jurisdiction too broadly and hence occasion international complications.

Thus, Mr. L'Heureux said (House Hearings, p. 811), "In contrast to [34 U.S.C. § 1201], article 2, section 12, has no limitation whatever and would make natives or visitors subject to military law. That could possibly create serious international complications. I am sure that the full exercise of this authority would violate a large number or all existing executive agreements in connection with leased bases. That is contrary to international law . . . [T]his bill provides in leased bases, where we usually have agreement with the people, and they are presumably friendly people—you should not regard that lease agreements, independent agreements, make these civilians subject to military law for military offenses."

Major General T. H. Green, then The Judge Advocate General of the Army, urged a similar limitation on the Senate Committee, his proposal being to limit Art. 2(12) to time of war or national emergency. He said, in a carefully drafted memorandum (Senate Hearings, p. 266):

> "It is to be noted that article 2(12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications."[4]

The House Committee's explanation of its amendments adding the "subject to" clause reflect the rationale of the foregoing objections. Here is the full excerpt from the

[4] It is interesting to note that General Green objected on constitutional grounds to Art. 3(a), UCMJ, which was invalidated in the *Toth* case. See 350 U.S. at 20-21.

Committee report (H.R. Rep. 491, 81st Cong., 1st sess., pp. 9-10):

"In addition to the committee amendments to H.R. 2498 which appear as original provisions in H.R. 4080, two substantive amendments to H.R. 4080 which are worthy of comment have been adopted by the committee. * * * The second amendment pertains to article 2, page 5, subdivision 11, beginning on line 18, and subdivision 12, beginning on line 24. You will note that subdivision 11 confers jurisdiction over all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and certain territories. Subdivision 12 confers jurisdiction over all persons within an area leased by the United States which is under the control of the Secretary of the Department and which is without the United States and certain Territories. It has been discovered that the United States armed forces occupy certain territory in the Philippines, which territory was originally acquired for the use of the United States by virtue of the 1898 Treaty with Spain, which territory continues to be used by our armed forces by virtue of the military base agreement of 1947 between the United States and the Philippines. We find that under the provisions of subdivision 12, we will have no jurisdiction over persons not otherwise subject to this code who enter this property and commit offenses while on the property. It is considered desirable to have such jurisdiction. On the other hand we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements. Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement. In order that our intent be made perfectly clear, the following amendment was adopted: On page 5, line 18, at the beginning of subdivision (11) insert 'Subject to the provisions of any treaty

> or agreement to which the United States is or may be a party or to any accepted rule of international law,' and substitute a small a for the capital A in 'All'.
>
> "On page 5, line 24, insert the same amendment as in subdivision (11) and, in addition, on line 24 after 'by' insert 'or otherwise reserved or acquired for the use of'.
>
> "The adoption of the proposed amendments in subdivision (11) and (12) will insure that the armed forces will have jurisdiction over both leased areas and areas otherwise reserved or acquired for the use of the United States and it will also insure that such jurisdiction is subject to the limitations imposed in any treaty or agreement to which the United States is or may be a party."

It is impossible, without wrenching sentences out of context, to draw from the foregoing any intention to render conditional upon foreign consent the exercise of American military jurisdiction over American civilians.

And the actual exercise of American military jurisdiction over civilians has not involved consensual conditions. As we have pointed out (Covert Br. 95-97), the jurisdiction purportedly conferred by Art. 2(11), UCMJ, has in fact been exercised without reference to the terms of the agreements with foreign countries.

Briefly to summarize what is there set forth in detail, the Army has tried in Japan a merchant seaman who was not a member of the "civilian component" within the meaning of the Administrative Agreement with Japan (*United States* v. *Robertson*, 5 USCMA 806, 19 CMR 102); it has tried in France Polish nationals who had been employed in Germany and brought to France as members of a Labor Service Company (*United States* v. *Wiman*, 3 USCMA 216, 11 CMR 216); and it has tried in Eritrea the British wife of an American soldier, a woman who had to be paroled by the Attorney General in order that she might be admitted to the Federal Reformatory for Women

at Alderson to serve her life sentence (*United States v Brailhart*, CM376967, petition for grant of review denied, 6 USCMA 808; No. 6774[5]).

It is simply not possible, therefore, to deduce from the terms of Art. 2(11) the conditional exercise of jurisdiction that the Court found there last June. Congress did not assert a jurisdiction to be exercised over American civilians only if the territorial sovereign consented, but rather a jurisdiction that was to be exercised over all persons falling within the literal terms of the provision except if the territorial sovereign objected, whether on grounds of written or unwritten international law. The cases just cited are inexplicable otherwise.

Or, more briefly expressed, the "Subject to" clause that introduces Art. 2(11) is a limitation, and not a condition.

C. If, as a Matter of American Law, Including American Constitutional Law, American Courts-Martial Have No Jurisdiction to Try Particular Civilians, Such Courts-Martial Cannot by Treaty or International Agreement be Given a Wider Jurisdiction, for the Reason That No Treaty Can Prevail Over Specific Constitutional Guarantees, in This Instance the Right to Trial by Jury.

Consideration of the powers conferred upon the United States by treaty or international agreement becomes relevant only if it is concluded that, but for such treaty or agreement, the jurisdiction now in issue cannot be sustained. For, plainly, if the Constitution and laws of the United States, without more, support the trial of civilian women by court-martial in time of peace, it is not necessary to look further.

On the assumption put, that American domestic law does not sustain the present trials, then the military jurisdiction

[5] The *Brailhart* case has been the subject of questions in the British Parliament. 544 Parl. Deb. (H.C.), 5th Series, Written Answers to Questions, 205-206 (July 28, 1955); 546 *id.* 201-202 (30 Nov 1955).

ere asserted must, necessarily, rest on the terms of a reaty. Otherwise stated, it would then be the treaty or nternational agreement that confers upon the court nartial a jurisdiction to try civilians that it would not therwise have had. To that extent, therefore, it would e the treaty or agreement that withdraws from the Ameri an civilians accompanying the forces the right to jury rial that otherwise would have been theirs, and relegates nem to the class of those who cannot claim that right.

No treaty, no international agreement, so this Court as repeatedly said, can go that far; to that extent the reaty power is not unlimited. On that point there is no iversity in the authorities:

(a) "It need hardly be said that a treaty cannot change he Constitution or to be held valid if it be in violation of hat instrument. This results from the nature and funda mental principles of our government." *The Cherokee Tobacco*, 11 Wall. 616, 620 621.

(b) "* * * it must be assumed that the framers of the Constitution intended that [the power to make treaties] would extend to all those objects which in the intercourse f nations had usually been regarded as the proper sub ects of negotiations and treaty, if not inconsistent with he nature of our government and the relation between the tates and the United States." *Holden* v. *Joy*, 17 Wall. 211, 43.

(c) "The treaty power, as expressed in the Constitution, in terms unlimited except by those restraints which are ound in that instrument against the action of the gov rnment or of its departments, and those arising from he nature of the government itself and of that of the tates." *Geofroy* v. *Riggs*, 133 U.S. 258, 267.

(d) In *Missouri* v. *Holland*, 252 U.S. 416, 433, it was spe ifically noted that "The treaty in question does not con ravene any prohibitory words to be found in the Con itution."

(e) "The treaty making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids', it does extend to all proper subjects of negotiation between our government and other nations." *Asakura* v. *Seattle*, 265 U.S. 332, 341.

(f) The treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320.

(g) Or, as Mr. Charles Evans Hughes summed up the matter in 1929, in the interval between his two terms of judicial service (*Proc. Am. Soc. Int. L., 1929*, p. 194),

> "I think it is perfectly idle to consider that the Supreme Court would ever hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power of the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated."

(h) Finally, only two terms ago, the Government urged on the Court these identical limitations on the treaty power. It said in *United States* v. *Capps*, 348 U.S. 296 (U.S. Br., No. 14, Oct. T. 1954, pp. 32, 49):

> "The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights, which govern all exercise of governmental authority in this country.
>
> * * * * * *
>
> "Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution which protect all Americans from the excesses of official authority."

If, therefore, the civilian women here concerned had a constitutional right to trial by jury as a matter of Amer-

lean law unaffected by treaty arrangements, then no agreement between the United States and any foreign nation, howsoever that agreement might have been effected, howsoever that agreement might have been expressed, could render them subject thereafter to trial by court martial. And in this connection the rose by some other name is not made less thorny when the treaty power is referred to (e.g., U.S. Supp. Br. 3) as "the powers of the United States in the conduct of foreign affairs." For the cases cited show that the United States is not empowered to conduct its foreign affairs in a manner that will violate specific constitutional guarantees.

Consequently, in resting its conclusion last June on the international arrangements between the United States and Japan, or between the United States and Great Britain, or between the United States and any other foreign country, the Court effectively contradicted its own denial (351 U.S. at 480) that "No question of the legal relation between treaties and the Constitution is presented."

Such a question can only be avoided if the existence or non-existence of the power to try these two civilian women by court-martial is bottomed squarely on the Constitution of the United States. If such power can be derived from that instrument, unaided by any exertion of the treaty power, unsupplemented by the terms of any agreement with a foreign nation, then the trials here in question were proper. If, on the other hand, no such power can be extracted from the Constitution, then the women here in question are entitled to their freedom forthwith, regardless of what any treaties or international agreements may have provided or assumed, and regardless of what foreign nations expect our military commanders to do (U.S. Supp. Br. 22 *et seq.*). American civilians are not to lose rights guaranteed them by the Constitution simply because such loss is found more convenient by foreign nations—or, for that matter, by our own Government.

It should always be remembered and just now, to judge from the tenor of the Government's Supplemental Brief, there seems to be some danger of forgetting it—that many significant portions of the Constitution were drafted and adopted in order to limit the powers of the Federal Government. Convenience is not the measure of constitutionality.

II. NOTHING IN THE CONSTITUTION OF THE UNITED STATES AUTHORIZES THE TRIAL OF CIVILIANS BY COURT-MARTIAL IN TIME OF PEACE AND NOT IN OCCUPIED TERRITORY

Not only is it not permissible for a treaty or international agreement to curtail personal rights specifically guaranteed by the Constitution, i.e., to evade or avoid limitations which that instrument has placed on the federal Government, but, put affirmatively, all power exerted by Congress must find a basis in the Constitution.

The opinion last June, which refers to a supposed cession or relinquishment of jurisdiction by foreign nations (351 U.S. at 473-474, 479) but points to no specific power conferred by the Constitution to sustain the trials in question, appears to overlook that principle, and so it may well be helpful if the earlier formulations by this Court were set forth in chronological order.

(a) *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326: "The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

(b) In *Ex parte Milligan*, 4 Wall. 2, every member of the Court had reached the same conclusion. Davis, J., for the majority, said (p. 119), "By that Constitution and the laws authorized by it, this question must be determined." And Chase, C. J., concurring in the judgment, said for himself and three others (pp. 136-137), "We agree in the proposition that no department of the Gov-

ernment of the United States—neither President, nor Congress, nor the courts—possesses any power not given by the Constitution."

(c) *Dorr v. United States*, 195 U.S. 138, 140: "It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government."

(d) *Graves v. O'Keefe*, 306 U.S. 466, 477: "* * * that government [i.e., the Federal government] derives its authority wholly from powers delegated to it by the constitution."

(e) *Ex parte Quirin*, 317 U.S. 1, 25: "Congress and the President, like the courts, possess no power not derived from the Constitution."

And so we examine the basic law to see whether, by any portion thereof, there is granted power to the federal government to try civilians by court-martial in time of peace. For if there is not, then no consent by any foreign country, no number of agreements with foreign countries, and no assumptions by American negotiators, can invest courts-martial with power that cannot be shown to have its origin in the Constitution.

A. The Power to Govern the Armed Forces Does Not Confer Any Power to Court-Martial Civilians in Time of Peace.

1. One hundred and seventy-five years of American history and experience, closely carrying forward the English heritage, establish that, outside of occupied territory where the laws of war apply, the only civilians who may constitutionally be tried by court-martial are those now included in Art. 2(10), UCMJ, viz., those who in time of war accompany the armed forces in the field.

The first problem presented by these cases is to fix the boundary between the civil and military jurisdiction of the United States, the line between those who can properly claim the right to a jury trial and those who

are subject to trial by court martial. In order to ascertain the precise location of that demarcation, we look to history, to the practical construction drawn from our whole national experience, and to those military trials that rest, not on the power to govern the armed forces but on other and distinct constitutional powers.

(a) Here, as in so many other constitutional situations, the starting point is Mr. Justice Holmes' admonition in *Gompers v. United States*, 233 U.S. 604, 610:

> "* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."

And so we look first to the English Law as it stood at the time of the adoption of the Constitution, the more appropriately so in this instance since the original American Articles of War were taken verbatim from their British prototypes, as John Adams, who drafted them, recorded in his diary. 3 *Works of John Adams* (C. F. Adams ed. 1851) 68-69, 83-84.

It is unnecessary in this connection to determine whether the models for the first American Articles of War were the British Articles of 1765 or those of 1774 (cf. Davis, *A Treatise on the Military Law of the United States* (3d ed. 1915) 340-341, espy. 341, n. 1), inasmuch as the British provisions dealing with military jurisdiction over civilians were the same in both sets. They read as follows:

> "All Suttlers and Retainers to a Camp, and all Persons whatsoever, serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War."

(Section 14, Art. 23 of the British Articles of 1774, Davis, *supra*, p. 593; Section XIV, Art. XXIII of the British Articles of 1765, Winthrop *1461 [reprint, p. 941]).[6]

This provision, with the sole substitution of "armies of the United States" for "Our Armies", became Art. 23 of Section XIII of the American Code of 1776 (5 J. Cont. Cong. 788, 800; Winthrop, *1497 [reprint, p. 967]).

The scope of the British provision was plain; it was limited to functionally connected civilians "in the field", a phrase of art that meant in time of hostilities in a place where military operations were under way. And, as will be pointed out below, for nearly a century and a half the British provision paralleled the scope of the American one.

Unless a British civilian came within the terms of the quoted provision, he was not subject to military law. Thus, in *Wolton* v. *Gavin*, 16 Q. B. 48 (1850), Lord Campbell, C. J., said (p. 61), "I think * * * that none are bound by the Mutiny Act or the Articles of War except Her Majesty's forces; and I am most anxious, as a constitutional Judge, that this should be fully understood to be my opinion." And Erle, J., though dissenting on another point, noted (p. 70) that "It is conceded that the Mutiny Act and the Articles of War apply only to military men: * * *."

This was the scope of British military jurisdiction when, late in the XIX Century, the Mutiny Act was superseded, and Articles of War were no longer promulgated. Army

[6] The system of abbreviations used in this brief is identical with that explained in the "Glossary of Military Law Abbreviations" that faces p. 1, Covert Br.

The following additional abbreviations will be encountered below:

D/A	Department of the Army
GCMO	General Court-Martial Orders
GO	General Orders
WD	War Department

Discipline and Regulation Act, 42 & 43 Vict. c. 33; Army Act, 1881, 44 & 45 Vict. c. 58.

The latter measure, now known simply as the Army Act, is annually reenacted in compliance with British constitutional principles,[1] and, by such reenactment is from time to time amended. Under the Army Act, as it was in force down to the end of 1956, certain civilians, not otherwise subject to military law, were so subject as officers if one "accompanies in an official capacity equivalent to that of an officer any of [Her] Majesty's troops on active service in any place" (§ 175(7)); and the following were so subject as soldiers: "All persons not otherwise subject to military law who are followers of or accompany [Her] Majesty's troops, or any portion thereof, when employed on active service:" § 176(10). The expression "on active service" was defined by § 189(1) to mean "whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country." See *Manual of Military Law, 1951* (H.M.S.O.) 392, 395, 414, giving the text of the Army Act as it then stood.

That is to say, under the British military code, accompanying civilians in occupied territory were subject to military law. Other accompanying civilians were subject thereto only when the force which they accompanied was engaged in military operations.

That jurisdiction, thus limited until just the other day, was, under the first heading, identical with that exercised

[1] "This act of 1881—the Army Act of 1881—now governs the army. But it is an act of a very peculiar character—it always requires another act to keep it in force—and in every session of parliament a brief act is passed renewing the act of 1881. This was but a change in parliamentary procedure, the principle is still preserved that the army shall be legalized only from year to year." Maitland, *The Constitutional History of England*, 448.

by American general courts-martial over civilians in occupied territory, under the war power conferred by AW 12 of 1916 through 1948 and Art. 18, UCMJ (Covert Br. 69-76). Under the second heading, it was the same, with reference to time and place of exercise, as the jurisdiction of American courts martial over civilians who were serving with the forces "in the field" under Art. 2(10), UCMJ, and under its predecessor provisions from the beginning (Covert Br. 42-47; Krueger Br. 12-16).

Since both countries had a common military constitutional heritage, namely, the common background of implacable hostility to excesses of military authority (*infra*, pp. 120-125), since the written military code of each had an identical starting point, it is therefore hardly surprising that in both countries the boundary between civil and military jurisdiction remained similarly identical for so many, many years.

It is only since January 1, 1957, that accompanying civilians have become subject to British military law under conditions other than "on active service," and even then there are disciplinary provisions which are in terms inapplicable to them. See The Army Act, 1955 (3 & 4 Eliz. II, c. 18) §§ 209, 213, and Fifth Schedule; The Air Force Act, 1955 (3 & 4 Eliz. II, c. 19), §§ 209, 211, and Fifth Schedule.* But since, of course, the British Parliament is not subject to constitutional restrictions, the traditional boundaries of British military jurisdiction are far more significant in the present connection than this very recent expansion can possibly be. Thus, British military law has a recapture provision similar to the now unconstitutional Art. 3(a), UCMJ. See *Toth v. Quarles*, 350 U.S. 11, 29-31, note 11.

(b) We end this digression to return to examine the development of American military jurisdiction.

* These measures came into force by, respectively, the Army Act, 1955 (Commencement) Order and the Air Force Act, 1955 (Commencement) Order (S.I. 1955 Nos. 1805, 1806).

American Articles of War, from 1775 up to 1916, followed faithfully the limitation written into the British Articles on which they were modeled: the only civilians triable by court-martial were those who accompanied the forces in the field. AW XXXII of 1775; Sec. XIII, Art. 23, of 1776; AW 60 of 1806; AW 63 of 1874. And "in the field" was uniformly construed, with only a few aberrations in World War I, since legislatively repudiated, as limited to the actual theatre of hostilities, in wars declared or undeclared. Covert Br. 39-41, 42-47; Krueger Br. 12-16.

The Articles of Confederation dealing with the power now in question in effect simply ratified what the Continental Congress had already done. The 4th paragraph of Art. IX provided that "The United States in Congress assembled shall also have the sole and exclusive right and power of * * * making rules for the government and regulation of the said land and naval forces, * * *"

What is now Clause 14 of Article I, Section 8, of the Constitution evoked no comment in the course of its inclusion. A draft in Randolph's hand, in the papers relating to the work of the Committee of Detail, enumerated among the powers proposed to be conferred upon the legislature the power (2 Farrand, *Records of the Federal Convention*, 137, 144) "15. To enact articles of war." On August 18, 1787, Clause 14 was adopted, in its present form (2 Farrand 323, 330, 333), and only Madison troubled to note, what was indeed self-evident, that (*id.* at 330) the new clause was "added from the existing Articles of Confederation."

Since nothing was said as to the scope of "land and naval Forces," it seems fair to assume that this expression included only those persons mentioned in the Articles of War then in force,[9] namely, those actually in a military

[9] A number of additional articles had been adopted by the Continental Congress after 1776, notably in 1786. Winthrop, *13-14, *1504-1508 (reprint, pp. 22-23, 972-975).

status and those civilians serving with the forces in the field. If a wider content had been intended, or even contemplated, surely some voice would have been raised in protest.

It is essential in this connection to bear in mind the vigor and hostility of contemporary feeling against any form of permanent military force. In the Convention, Gerry attempted, for all time, to limit the standing army to two or three thousand men. 2 Farrand 323, 329, 330; Warren, *The Making of the Constitution*, 482-484. One of George Mason's reasons for not signing the Constitution was that it did not protect against the danger of standing armies in time of peace. 2 Farrand 640. Cf. 3 *id.* 207 (Luther Martin).

In the ratification process, Hamilton had to devote four numbers of *The Federalist*—23, 24, 25, 41—to a justification of the army clause. Even so, a number of the states proposed declarations of rights asserting that standing armies in time of peace were dangerous to liberty (1 Elliot's *Debates* 335 [No. XVII, Rhode Island]; 3 *id.* 660 [No. 17, Virginia]; 4 *id.* 244 [No. 17 North Carolina]), and some states proposed amendments against such forces in the absence of a two-thirds vote by Congress (3 *id.* 660 [No. 9, Virginia]; 4 *id.* 245 [No. 9, North Carolina]), or even at all (1 *id.* 336 [No. XII, Rhode Island]). Compare 1 *id.* 328 (New York, no standing army except in cases of necessity); 2 *id.* 552 (Maryland, no mutiny bill to continue in force longer than two years).

And the enactments of the first Congress for a virtually miniscule force (Act of Sept. 29, 1789, c. 25, 1 Stat. 95; Act of April 30, 1790, c. 10, 1 Stat. 119) were assailed by some of the members as utterly unconstitutional (*The Journal of William Maclay* (1927 ed.) 221, 235).

In that setting, if "land and naval Forces" had ever been intended as—or even suspected of being capable

of interpretation as—"a broad grant susceptible of expansion under changing circumstances" (352 U.S. at 902), if, specifically, it could ever have been imagined as wide enough to include the wives and dependents of such forces in time of peace, it is inconceivable that this possibility would have been passed over in silence by all of the articulate anti-Federalists, as in fact it was.

Certainly it is not possible, without palpable misreading, to find any basis for such an expansion in what Hamilton wrote in No. 23 of *The Federalist*.

Let us take the passages that the Government (U.S. Supp. Br. 70) has italicized:

> (i) "* * * to raise armies; to build and equip fleets; *to prescribe rules for the government of both;* * * *"*

The antecedents of the word "both", plainly enough, are "armies" and "fleets". How can that possibly suggest the inclusion of civilian dependents?

> (ii) "*These powers ought to exist without limitation; because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*"

"These powers" and "them," again, refer to the powers to raise armies, to build fleets, "to prescribe rules for the government of both," and to direct their operations and to provide for their support. But to suggest that the language means that "land and naval Forces" must be read as including civilian dependents plainly begs the question.

> (iii) "Are fleets and armies, and revenues, necessary for this purpose? The government of the union must be empowered to pass all laws, *and to make all regulations which have relation to them.*"

What was meant by "them"? As a matter of grammar, "them" could only have referred to "fleets and armies,

and revenues." Conceding (U.S. Supp. Br. 71) that "Hamilton was a distinguished army officer who undoubtedly knew that civilians under certain circumstances were subject to court-martial jurisdiction," there is certainly nothing in any of the passages quoted, which presumably are the strongest that concerted, cooperative research could discover, to show that he ever envisaged extending military jurisdiction over any civilians not within the British or Continental Articles of War, viz., the narrow class of functionally connected persons in the area of hostilities in time of actual hostilities. And none of the voluble opponents of the new Constitution, who assuredly were not without resourcefulness in predicting horribles of an imaginary nature, appear to have thought so either.

Moreover, as will be pointed out, below, pp. 44-45, Hamilton's contemporaneous exposition of the Necessary and Proper Clause did not by any stretch of language or imagination suggest a wider scope for military jurisdiction over civilians. And the interpretation and practice of the military authorities for over a century and a quarter thereafter is consistent only with the view that the boundary between civil and military jurisdiction had been irrevocably fixed by the Constitution.

In this connection, it is to be noted that the jurisdiction exercised by the Continental Congress over civilians who were spies or who trafficked with the enemy (U.S. Supp. Br. 77-78) was, as *Ex parte Quirin*, 317 U.S. 1, shows, legislation defining war offenses and directed at offenders against the laws of war. And Winthrop's authoritative discussion of the scope of such provisions shows (*138-*142 [reprint, pp. 102-104]) that this war jurisdiction "must be understood to be limited to acts committed on the theatre of war or within the scope of martial law." Here again, the precedents do not help the Government in the present cases.

(c) If, as this Court has done on another occasion (*Ex parte Quirin*, 317 U.S. 1, 35), we look to the "long

course of practical administrative construction by [the Government's] military authorities," then it is plain that the power to make rules and regulations for the government of the land and naval forces does not include the power to court-martial wives of the members of those forces.

As has already been pointed out at great length, Covert Br. 42-52; Krueger Br. 12-16, the only civilians ever tried by court-martial prior to 1916, no matter how functionally connected with the forces, were those who accompanied those forces "in the field" in time of war, declared or otherwise—and "in the field" was always construed to mean a theater of operations where hostilities were in progress.

Indeed, since AW 63 of 1874 and its predecessors were restricted to retainers to the camp and to those "*serving with* the armies of the United States in the field," it covered only individuals whose duties had some functional connection with the armies. Winthrop *131-137 (reprint, pp. 98-101).

We will not repeat or reprint the authorities set forth there or in the earlier briefs. But it is not without interest that, in *Madsen* v. *Kinsella*, 343 U.S. 341, the Government, after thorough consideration of the authorities, came to precisely the same conclusion that we do as to the extent of the pre-1916 court-martial jurisdiction over civilians. Here are pertinent extracts from its brief (No. 411, Oct. T. 1951):

> "* * * we will demonstrate that courts martial probably never possessed jurisdiction over the wives and dependents of a soldier, or over any civilian except during a time and in the vicinity of military operations, and that, in any event, prior to 1916 courts martial never had jurisdiction to try a soldier's wife or any other civilians for murder or any of the other serious civil crimes enumerated in Art. 58 of the pre-1916 Articles of War." (p. 30)

> "Petitioner's contention that the wives of soldiers were subject to trial by court martial prior to 1916 under the former AW 63 [of 1874; Winthrop, *1531 (reprint, p. 991)] is inconsistent with the terms and construction of that article, and is based upon dubious authority." (p. 44)

Particular attention is directed to Point 1B2 of that brief (pp. 40-45), which bears the heading, "Prior to 1916, courts martial probably lacked jurisdiction over any civilians except in an area of combat operations, and clearly were without jurisdiction over soldiers' dependents bearing no relationship to the army as a fighting force." We commend that discussion to the Court, not by way of debating point, not to impeach an adversary with prior inconsistent statements, but because those pages contain a reasoned and accurate exposition of the pre-1916 military jurisdiction over civilians, and because the conclusions there set forth are those which any objective lawyer, familiar with the materials, is bound to reach.

The Government's present brief on the same point is permeated by a significant dualism. On the one hand, there is grudging recognition that AW 2(d) of 1916 involved an expansion of the class of civilians who were declared to be subject to military law (U.S. Supp. Br. 80). On the other hand, there is an apparent refusal to concede that the pre-1916 court-martial jurisdiction was a very limited one, narrowly circumscribed as to time, place, and functional connection, and the argument is that since some civilians were subject to military law in 1789, it does no violence to the Constitution to include a few more (U.S. Supp. Br. 76-82). But those contentions entirely overlook the circumstance that every expansion of court-martial jurisdiction necessarily contracts—and infringes—the double guarantee of jury trial.

(d) The foregoing consistent practice, over a period of well over a century, from 1775 to 1916—and, so far as dependent wives are concerned, from 1775 to 1950—prac-

tice that was primarily formulated by the very military authorities whose jurisdiction was in question, and that was uniformly concurred in by the law officers of the Government, fixes in definitive fashion the scope of the military jurisdiction, and, on the other side of the boundary, the extent of the guarantee of jury trial.

The foregoing conclusion follows on any of three independent approaches:

First. A settled construction of the Constitution, at first contemporaneous with its adoption, and then followed by practice, usage, and acquiescence over a long period is not only of very great weight, but may be well nigh conclusive. E.g., *Stuart* v. *Laird*, 1 Cranch 299, 309; *Murray* v. *Hoboken Land Co.*, 18 How. 272, 279-280; *Burrow Giles Co.* v. *Sarony*, 111 U.S. 53, 57; *Hampton & Co.* v. *United States*, 276 U.S. 394, 412. Or, as it was phrased with characteristic felicity by Mr. Justice (then Chief Judge) Cardozo, "Not lightly vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884.

Second. In ascertaining who may successfully claim the right of trial by jury, we look to see who, by common understanding, had that right in 1789. See, e.g., *Callan* v. *Wilson*, 127 U.S. 540; *In re Debs*, 158 U.S. 564; *District of Columbia* v. *Colts*, 282 U.S. 63; *District of Columbia* v. *Clawans*, 300 U.S. 617; *Ex parte Quirin*, 317 U.S. 1, 38-41; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127.

Third. In every instance that an attempt to enlarge the scope of military jurisdiction at the expense of trial by jury as it existed in 1789 has come before this Court, that attempt has failed. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11.

Howsoever the problem is viewed, therefore, the conclusion is always the same. These wives cannot be sub-

jected to trial by court martial by reason of anything in Clause 14 of Section 8 of Article I.

(c) Needless to say, none of the foregoing has any application to occupied territory, where the laws of war prevail. *Madsen* v. *Kinsella*, 343 U.S. 341; and see the detailed references collected at Covert Br. 69-76.

2. Nothing in the Necessary and Proper Clause, either as a matter of construction or of application over the years, enlarges the scope of "land and naval Forces" in Clause 14, essentially because any such enlargement would necessarily—and improperly—restrict the class of persons falling within the dual constitutional guarantee of jury trial.

The Necessary and Proper Clause of the Constitution (Art. I, Sec. 8, Cl. 18—was not, so far as the records reveal, much discussed in the Convention. See 2 Farrand 168, 182, 344-345. It is true that three members, Edmund Randolph, Elbridge Gerry, and George Mason, refused to sign the final draft of the Constitution because they felt that this clause would too greatly expand the powers of Congress, a danger particularly to be feared in the absence of any Bill of Rights. 2 Farrand 563, 633, 640.

Thus, included in Mason's "Objections to this Constitution of Government," September 15, 1787, was the following (2 Farrand 637, 640):

> "Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.
>
> "There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace."

The objections of Randolph and Gerry (2 Farrand 563, 633) were similar in tenor, and it is significant that Gerry, that inveterate anti-militarist, who in 1784 had proposed to the Continental Congress a resolution solemnly declaring (27 J. Cont. Cong. 518) that "standing armies in time of peace, are inconsistent with the principles of republican Governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism," and who in 1787 had desired to limit the peace time standing army for all time to two or three thousand men (*supra*, p. 37), never intimated that his objection to the Necessary and Proper Clause was based on any possibility that it might be resorted to in an endeavor to subject to military jurisdiction a class of civilians who had not customarily and traditionally been so subjected.

Hamilton's defense of the Necessary and Proper Clause was hardly calculated to suggest any such possibility; here is what was written concerning that provision in No. 33 of *The Federalist*:

> "But Suspicion may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it: as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare."

Even when read together with those passages from No. 23 that the Government now quotes (U.S. Supp. Br. 70-71),

and, as we show, misreads, *supra*, pp. 38-39), there is nothing in this contemporaneous exposition of the Necessary and Proper Clause that would lead "Suspicion", in the shape of the many opponents of the new Constitution, to think that, by expanding the content of Clause 14, Clause 18 would be able correspondingly to abridge the guarantee of jury trial already contained in Section 2 of Article III. And assurances from other quarters were similar in tenor to Hamilton's.

Thus, James Wilson, later a Justice of this Court, said in the Pennsylvania Convention (2 Elliot 468):

> "* * * and even the concluding clause, with which so much fault has been found, gives no more or other powers; nor does it, in any degree, go beyond the particular enumeration; for, when it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, 'for carrying into execution the foregoing powers.' It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution."

Similarly, Randolph told the members of the Virginia ratifying convention (3 Elliot 206):

> "The sweeping clause, as it is called, is much dreaded. I find that I differ from several gentlemen on this point. This formidable clause does not in the least increase the powers of Congress. It is only inserted, for greater caution, and to prevent the possibility of encroaching upon the powers of Congress. No sophistry will be permitted to be used to explain away any of those powers; nor can they possibly assume any other power, but what is contained in the Constitution, without absolute usurpation."

After the Constitution went into effect, Congress made provision for a small standing Army, primarily for defense against Indian attacks. The Continental Articles of War (1775, pp. 22-23, 26) were twice continued in force

the second time "as far as the same may be applicable to the constitution of the United States." Sec. 4 of the Act of Sept. 29, 1789, *supra*, 1 Stat. at 96; Sec. 13 of the Act of April 30, 1790, *supra*, 1 Stat. at 121.

In ascertaining whether the Clause 14 "power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances" (352 U.S. at 902), it is demonstrable that the literal construction of the clauses involved, the practice of a century and a half, and the decisions of this Court, all coincide in answering the stated inquiry in the negative.

First. As has been pointed out (Covert Br. 76-81), nothing in the Fifth Amendment enlarges the grant of court-martial jurisdiction in Clause 14; not only because nothing in the first ten Amendments, which were designed as limitations on the new Federal government, could possibly have enlarged any substantive powers granted to that government by the Constitution, but also because, as a matter of language and textual history, the true meaning of "cases arising in the land and naval forces" in the Fifth Amendment is, "cases arising in the government of the land and naval forces."[19]

It is significant in this connection that the exception in the Fifth Amendment does not suggest that the scope of "land and naval forces" could properly be broadened by anything in Clause 18. Certainly when the Bill of Rights was passing through the First Congress, the members must have been aware of the discussions of the Necessary and Proper Clause which the ratification process had evoked. But neither they nor the other proponents of Bills of Rights (Covert Br. 79) ever suggested an exception reading "except cases arising in the land and naval forces as that term may hereafter be expanded when from

[19] In accord with the analysis at Covert Br. 78-81 is Chase, C. J., concurring in *Ex parte Milligan*, 4 Wall. 2, 138.

time to time deemed necessary and proper", or couched in equivalent language.

There is no basis in any of the contemporary materials or in any inferences that can properly be drawn from such materials that anyone, in 1787, or 1789, or 1791, ever for a moment considered that the concept of "land and naval Forces" in Clause 14 could be broadened beyond the class of those then subject to trial by court-martial, viz., those actually in the service, and those few functionally connected civilians who served with them "in the field", i.e., in an area of operations during a period of hostilities.

Second. For almost a century after Chief Justice Marshall first demonstrated the potentialities of the Necessary and Proper Clause in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), it never occurred to any military men that Clause 18 enlarged the scope of "land and naval Forces" in Clause 14, or to read *The Federalist* as the Government now does (U.S. Supp. Br. 69-71). There were ample opportunities for suggesting the enlargement, notably in the instance of the post trader, who was so closely connected functionally with the Army's operations in the Indian country in the West. If the Government's present arguments (U.S. Supp. Br. 76-82) were sound, then the post trader would have been amenable to military law. But the actual holding was that he was not, and could not be made, so subject. See Covert Br. 45-47. Never, until 1916, was any attempt made to enlarge the class of civilians made subject to military law, and neither at that time nor thereafter was the expansion sought to be rested on the Necessary and Proper Clause. Indeed, as we show below, pp. 54-58, no constitutional justification for the expansion was ever offered.

It does not follow that because "land and naval Forces" has a fixed content with respect to those persons who may constitutionally be tried by courts-martial that the Constitution restricts warfare to the use of either the

weapons or the personnel that achieved American independence in 1775-1783.

Thus, nothing in the concept of "land * * * Forces" precludes the fullest utilization of advances in technology. The Army was first provided a Signal Officer in 1860 (Act of June 21, 1860, c. 163, 12 Stat. 64, 66), and a full fledged Signal Corps a few years later (Sec. 17 of the Act of March 3, 1863, c. 79, 12 Stat. 244, 753). The Civil War likewise saw the first extensive military use of railroads (see *Reminiscences of General Haupt* [Director of U. S. Military Railroads, 1862-1863]).

Military aviation dates from the establishment of an Aeronautical Division in the Office of the Chief Signal Officer in 1907 (*The Army Almanac* [1950] 211), and of the Aviation Section of the Signal Corps by the Act of July 18, 1914, c. 186, 38 Stat. 514. The First World War brought tanks (GO 80, WD, 1918; Act of July 11, 1919, c. 8, 41 Stat. 104, 129) and chemical warfare (GO 139, WD, 1917; GO 80, WD, 1918; Act of July 11, 1919, *supra*, at 129). Atomic weapons were developed and used by the Army in World War II (*The Army Almanac*, 867-869; Baxter, *Scientists against Time*, 438-447). Today we live in an age of guided missiles and Pentomic divisions.

Just as the Commerce Clause drafted in 1787 is ample for the regulation of railroads, radio, and television, so the military clauses of the Constitution are broad enough to encompass new weapons and ever more destructive methods of warfare. We would not for a moment contend that the United States Air Force has no power to court-martial airmen simply because the Framers did not envisage aircraft.[13] But we put that power, not on the ground that "land and naval Forces" was envisaged as having an expansible content as to the class of persons included

[13] Such a contention is actually being put forward, with apparent seriousness, in *Atkinson* v. *Quarles*, No. 13446 in the U.S. Court of Appeals for the D. C. Circuit.

therein (U.S. Supp. Br. 15, 75) the materials collected above, pp. 36-47, show clearly that it was not but because, since the Army had power to try its aviators by court-martial while they were members, successively, of the Aviation Section of the Signal Corps, the Air Service, the Air Corps, and the Army Air Forces, that power did not disappear when Congress, for administrative and military reasons, reconstituted the identical military personnel on a basis of complete autonomy as the United States Air Force by the National Security Act of 1947, c. 343, 61 Stat. 495.

Nor do we contend that women regularly in the military service cannot be subjected to military law. Thus, nurses were originally civilian employees (see Sec. 5 of the Act of March 16, 1802, c. 9, 2 Stat. 132, 134; GO 120, WD, 1900). They were first militarized by Sec. 19 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 753; for later legislation, see Ch. V of the Act of July 9, 1918, c. 143, 40 Stat. 845, 879; and Army-Navy Nurses Act of April 16, 1947, c. 38, 61 Stat. 41. Similarly, the first women in the Army, the Women's Army Auxiliary Corps, were not subject to military law except overseas. Sec. 14 of the Act of May 14, 1942, c. 312, 56 Stat. 278, 281. Later however, as the Women's Army Corps, they were given full military status (Act of July 1, 1943, c. 187, 57 Stat. 371), and in 1948 they were integrated into the Regular Army. Women's Armed Services Integration Act of June 12, 1948, c. 449, 62 Stat. 356. Plainly, these women are subject to military law even though the only embattled Amazon known to the Founders was Molly Pitcher at the Battle of Monmouth.

What we do urge is that the question of amenability to military law rests, not on weapons, not on sex, not on technological advances, but on status: Persons in the service are subject to military law, persons not in the

service are not. *Accord*: Winthrop, *145 (reprint, p. 106).[12]

Third. The true reason why the class of persons triable by court-martial under Clause 14 has never been deemed enlarged by the Necessary and Proper Clause is that any such enlargement would correspondingly contract the class of civilians who could claim the dual constitutional guarantee of jury trial. Since, as this Court has repeatedly held (*Callan* v. *Wilson*, 127 U.S. 540; *Thompson* v. *Utah*, 170 U.S. 343; *Rassmussen* v. *United States*, 197 U.S. 516; *Patton* v. *United States*, 281 U.S. 276; *District of Columbia* v. *Colts*, 282 U.S. 63; cf. *Andres* v. *United States*, 333 U.S. 740), the right to a jury trial preserves the incidents and the scope of such trial as both stood in 1789, there could be no room for Clause 18 to operate by enlarging the content of "land and naval Forces" in Clause 14. Both provisions were necessarily limited by the provisions for jury trial in Art. III, § 2, and in the Sixth Amendment. All four provisions must be construed together (*Prout* v. *Starr*, 188 U.S. 537, 543-544; cf. *Knowlton* v. *Moore*, 178 U.S. 41), and they can be construed together only by carrying forward without change the boundary between civil and military jurisdiction as that boundary had been acknowledged and established in 1789.

The basic fallacy underlying the Government's arguments (U.S. Supp. Br. 10, 76-80) is that they treat the extension of court-martial jurisdiction over civilians as a matter of legislative judgment, needing only a rational basis, as though some question of substantive due process

[12] It is status, rather than wearing of the uniform, that explains *Johnson* v. *Sayre*, 158 U.S. 109, a case somewhat haltingly put forward at U.S. Supp. Br. 80. The Court there held that, since a paymaster's clerk in the Navy was for some purposes an officer (*United States* v. *Hendee*, 124 U.S. 309), he was (p. 117) "a person in the naval service of the United States." But *Johnson* v. *Sayre* hardly supports the proposition that the dependent wives of naval personnel are similarly in the naval service.

were alone involved, and that they completely ignore, what would seem to be obvious to any disinterested observer, that every such extension necessarily involves a corresponding contraction of the right to trial by jury. This cavalier approach reaches its apogee in the statement (U.S. Supp. Br. 79) that "the Federal Constitution * * * has no prohibition against the extension of court martial jurisdiction * * *."

Is the Solicitor General really this unaware of Art. III, Sec. 2, and of the Sixth Amendment?

It is noteworthy in this connection that in no other instance and in no other case under the Necessary and Proper Clause has that clause been relied upon, or held, to impinge upon a single personal guarantee contained in the Bill of Rights. True, Congressional power has been enlarged; obstructions to the exercise of such enlarged power have been prevented and punished; and with each increase of Federal power there has necessarily been a corresponding diminution of the power of the several States. Were it otherwise, as Marshall wrote Story a month after *M'Culloch* v. *Maryland*, "the Constitution would be converted into the old Confederation" (14 *Proc. Mass. Hist. Soc.*, 2d series, 325). But never, in any decision of this Court of which we are aware, has the operation of the Necessary and Proper Clause been permitted to erode a single one of those personal liberties that were and are guaranteed by the first eight Amendments.

The distinction is well illustrated by *McKinley* v. *United States*, 249 U.S. 399. During World War I, Congress authorized the Secretary of War to make regulations to suppress houses of ill-fame in the vicinity of military camps, and plaintiffs in error were convicted of keeping such a house within 5 miles of a camp, in violation of the regulations. Plainly, since Congress is empowered to raise and support armies, it may do whatever is necessary to protect the health and welfare of those armies, however

much its legislation and the regulations promulgated pursuant thereto might impinge on what would otherwise (*Keller v. United States*, 213 U.S. 138) be the subject of the police power of the States exclusively. This Court accordingly sustained the conviction. But it does not follow that the Necessary and Proper Clause could empower Congress to subject the keeper of the house of ill fame, or its inmates, to trial by court-martial.

The distinction is further illustrated by the Espionage Act cases of World War I, which upheld convictions for attempts to obstruct recruiting by words of persuasion (*Schenck v. United States*, 249 U.S. 47; *Frohwerk v. United States*, 249 U.S. 204), inciting to insubordination (*Debs v. United States*, 249 U.S. 211), and spreading false reports to promote the success of the enemy (*Schaefer v. United States*, 251 U.S. 466). See also *Abrams v. United States*, 250 U.S. 616. The constitutional basis of the foregoing cases—apart from the scope of the First Amendment, which divided the Court in the last two decisions cited—was that since Congress had power to raise and support armies and to declare war, it had in addition all power necessary and proper to carry those enumerated powers into execution by punishing obstructions to their exercise. Here again, it does not follow that the Necessary and Proper Clause empowered Congress to try the defendants in question by court-martial—and in this instance such a course was actually put forward.

In April 1918, Senator Chamberlain, then Chairman of the Committee on Military Affairs, introduced a bill that proposed to declare to be spies, triable by court-martial or military commission, and punishable by death, "any person * * * who shall, anywhere in the United States, in time of war, endanger or interfere with the * * * successful operations of the land or naval forces of the United States, (a) by causing or attempting to cause insubordination * * * or (b) by delivering or transmitting * * * to any member of such land and naval forces any written or

printed matter which shall support or favor the cause of the enemy countries or of its allies in the war, or which shall contain any false reports or false statements intended to interfere with the successful operation of such land or naval forces, or (e) by printing or publishing any such printed matter * * *." S. 4364, 65th Cong., 2d sess. See 56 Cong. Rec. 5120, 5401-5402, 5471-5472.

President Wilson wrote of the measure, "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America * * *." That killed the bill. Rankin, *When Civil Law Fails*, 138-139.

These illustrations, show, we think, both the scope and the limitations of the "Necessary and Proper Clause." Nothing in that clause, we submit, can operate to extend the scope of trial by court martial at the expense of the guarantee of jury trial.

Fourth. The development of the Necessary and Proper Clause has adhered closely to what was foreshadowed for it in Chief Justice Marshall's original exposition (*McCulloch v. Maryland*, 4 Wheat. 316, 421),

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Yet this seminal passage demonstrates precisely why it was that for over a century no one sought in reliance on the Necessary and Proper Clause to enlarge the scope of "land and naval Forces" in Clause 14, and why such an effort must fail today.

To deprive of the right to jury trial a group of civilians who had that right in 1789 and who were never sought to be denied it for over a century and a quarter thereafter

Is not a legitimate end;

Is not within the scope of the Constitution,

Is twice prohibited by the Constitution; and

Is wholly inconsistent with the spirit of the Constitution.

Fifth. Only last Term, this Court considered the precise question here involved, viz., whether the grant of court-martial jurisdiction in Clause 14 was enlarged by anything in the Necessary and Proper Clause. It answered that question with a resounding negative. *Toth* v. *Quarles*, 350 U.S. 11. As was there said (pp. 21-22):

> "None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause."

The materials collected under the present heading demonstrate conclusively that the foregoing holding accords with both the letter and the spirit of the Constitution. And the Government's present arguments, once the slurring over of historical facts and the misread sentences now found therein are eliminated, adduce nothing of substance to the contrary.

3. Significantly enough, the power purportedly conferred by Art. 2(11), UCMJ, under which the present prosecutions were instituted, has never been sought to be constitutionally justified in any legislative discussion, and was not rested on Clause 14, with or without Clause 18, in this Court's opinion last June.

The scope of court-martial jurisdiction over civilians as it stood until the effective date of the 1916 Articles of War was that set forth in AW 63 of 1874, which was part of R. S. § 1342 (Winthrop, * 1531 [reprint, p. 991]):

> "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."[13]

The expansion of military jurisdiction effected in 1916 is shown by AW 2(d):

> "(d). All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;"[14]

Thus there was enacted a double expansion of military jurisdiction. First, civilians serving with the armies were included for times and places other than "in the field" in time of war or hostilities. Second, civilians who were merely accompanying the armies, and not actually serving with them, were also included.

"Serving" had been uniformly construed to imply some functional connection with the forces; see the many instances enumerated in Winthrop at *134-*135 (reprint, pp. 99-100). "Accompanying", on the other hand, necessarily implied mere physical presence, and therefore was a further stage removed from "land and naval Forces." A person serving with those forces might arguably be deemed a "part" of them, at least for some purposes, cf. *Toth* v. *Quarles*, 350 U.S. at 15. But a person simply physically present and having no functional connection with them could hardly be so designated.

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[13] For earlier forms of the text, see U. S. Reid Br. 33 and Covert Br. 43.

[14] The introductory paragraph of AW 2 of 1916 is set forth at Covert Br. 124.

Neither extension, however, was sought to be justified on constitutional grounds, nor was any constitutional argument ever even articulated in the cause of the legislative process, in 1916, in 1920, in 1948, or in 1949-50; see the extensive references collected at Covert Br. 52-60, 64-65.

It is meaningless to say (351 U.S. at 478) that the Code "was adopted by Congress only after an exhaustive study of several years duration and the consultation of acknowledged authorities in the fields of constitutional and military law," when it is perfectly plain from the mass of legislative materials available, including the studies and drafts preliminary to the first bills introduced, that no one gave any thought, much less any study, to the central constitutional problem of the present cases.

We know that the Chairman of the Secretary of Defense's Committee on the Code, Prof. E. M. Morgan, was on record in print as resting the asserted camp-follower jurisdiction on the words of the Fifth Amendment. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107. We know from that published paper that his conclusion was not buttressed by any citation of authority. We also know that the *Manual for Courts-Martial*, ever since the 1890's, had pointed to the Fifth Amendment as a source of military jurisdiction, and that this view had some support in lower court decisions. Covert Br. 77.

Indeed, the tacit and, so far as the legislative history is concerned, wholly inarticulate premise on which all proceeded was not undercut until the decision in *Toth* v. *Quarles*, 350 U.S. 11, which established, what indeed should have been apparent to all, that nothing in the Bill of Rights, which was designed to limit the powers of the United States that had been granted in the Constitution proper, could possibly expand those powers.

We do not mean to disparage those who overlooked what now appears obvious from the superior vantage point of

hindsight.[15] We do say, however, that it is hardly helpful to suggest that there is any merit in having had under long consideration a question that plainly was not studied, or to urge that a conclusion based on demonstrable lack of inquiry becomes sounder when those who failed to examine what is now in issue may possibly have had, as to other questions that they did in fact study, the status of "acknowledged authorities."

Indeed, the attempt to shore up the validity of Art. 2(11) by reference to the supposed personal qualities of its draftsmen breaks down utterly when it is recalled that these gentlemen justified their inclusion of Alaska west of Long 170° West with its provisions, on the ground that there, in the far Aleutians, "a civil court system is not readily available" (*supra*, p. 21). Such a profound unawareness of *Rassmussen v. United States*, 197 U.S. 516, which plainly held that the guarantee of jury trial extended to all of Alaska, suggests that any further evaluation of the draftsmen's qualifications could only be invidious.

It seems to us significant that the present trials by court-martial were not rested on Clause 14, either with or without Clause 18, in this Court's opinion last June. After all, *Toth v. Quarles*, 350 U.S. 11, then just recently decided, had squarely held (at 15) that the Clause 14 power "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces," and had further held (at 21-23) that the Clause 14 power is not broadened by Clause 18 and is to be narrowly limited to "*the least possible power adequate to the end proposed.*" Moreover, the mass of military and legislative materials

[15] Thus, in Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 Calif. L. Rev. 75, the discussion of what civilians are subject to military law proper (pp. 75-90) is consistently couched in terms of whether their cases can be considered as "arising in the land and naval forces."

Present counsel has already confessed error on the same point. Covert Br. 78, note 58.

adduced had demonstrated that the asserted military jurisdiction could not be justified as an original proposition (Covert Br. 36-91).

In any event, it seems crystal clear that last June the military jurisdiction here asserted was rested on a basis other than that under which it was plainly exerted, for the reason that some or all of the arguments against that jurisdiction were, as a matter of law, too compelling to permit of any other course.

4. Since civilian dependents admittedly cannot be tried by court-martial in the United States although members of the armed forces can be, the present assertion of power must rest on the untenable proposition that a civilian dependent accompanying the armed forces overseas loses his or her civilian status.

If it be contended or assumed that civilian dependents accompanying the armed forces, living on military reservations within the United States and enjoying certain physical military amenities, constitute a part of the "land and naval Forces", either by virtue of Clause 14 or in consequence of Clause 14 as broadened and supplemented by Clause 18, then, plainly, wives and children, whose relationships to the military head of their household and to the military establishment at places within the United States are, in every significant aspect, identical with Mrs. Smith's relationship with and to the Army in Japan and with Mrs. Covert's relationship with and to the Air Force in England, must be equally subject to trial by court-martial: Being a part of the land and naval forces, they are impliedly excepted from the guarantee of jury trial.

We understand that the Government disclaims any such contention,[18] and certainly the military precedents do. See the rulings collected at Covert Br. 39-42.

[18] Except possibly as to the right to retry Mrs. Covert by court-martial within the District of Columbia, as to which see Covert Br. 21-36 and pp. 160-168 *infra*.

Since, plainly, members of the armed forces within the United States cannot claim the guarantee of jury trial when facing a court-martial, the question within the United States is one of status (Winthrop, *145 [reprint, p. 906]), and is therefore, as was suggested at the original argument (Ward & Paul transcript, p. 47), "Who?" rather than "Where?"

If then, wives lose their immunity from trial by court martial once they are overseas, it must be on some basis other than the scope of "land and naval Forces" within the United States.

One basis would be that certain provisions of the Constitution are not operative abroad, that while certain clauses of that instrument are available for export, so that the President remains Commander-in-Chief of American forces overseas, and so that Congress can make punishable acts done abroad (e.g., *Jones v. United States*, 137 U.S. 202; *United States v. Bowman*, 260 U.S. 94; *Blackmer v. United States*, 284 U.S. 421; *Kawakita v. United States*, 343 U.S. 717), the guarantee of bail and the dual guarantee of jury trial somehow stop at the water's edge.

We point out below, pp. 68, 91-92, 95-96, the untenability of any such assumption.

The only other basis would be that "land and naval Forces" somehow has a greater content outside the United States. We propose to demonstrate that this argument is inherently absurd; that the overseas amenities enjoyed by civilian dependents, to the extent that they may vary from those available in the United States, cannot change a civilian into a soldier; that the present assertion of "practical necessities" is too recent to be convincing; and that the specific terms of the NATO treaties show that the United States has agreed to a treatment of civilian dependents different from that which it obtained for others.

First. The inherent absurdity of the present contention can be demonstrated by a few simple examples.

Let us suppose the case of a transport, carrying military personnel and their dependents to the Far East in connection with an Operation Gyroscope rotation of combat units between the United States and overseas.

On the assumption under consideration, the wives and children are not a part of the land forces when the ship is two miles beyond the Golden Gate—but when the transport is four miles out, or at any rate when it steams past the outer limit of the Continental Shelf, they are.

Another case: It has frequently happened in the past that military personnel accompanied by their civilian dependents are transported overseas by commercial rather than military transportation. If a dependent wife accompanying her military husband were to kill him on board a privately owned American ship, on which they were both travelling pursuant to military orders, and the homicide took place a thousand miles from the American coast, she would (in view of 18 U.S.C. § 7) have violated 18 U.S.C. § 1111, and would accordingly be triable—before a jury in the first United States judicial district into which she could be brought. 18 U.S.C. § 3238.

But, on the assumption now under consideration, if she committed the same homicide at the same place on a military transport she would be triable by court-martial, without a jury—because then, so the argument runs, she would be a part of the land and naval forces.

Second. It is earnestly argued, however (U.S. Supp. Br. 25-26), that "All civilians who accompany the armed forces overseas are so closely identified with those forces as to be indistinguishable from them for all practical purposes." But on analysis, such amenities as are made available to overseas dependents (U.S. Supp. Br. 26-27) fall into three classes, none of which can possibly affect their status.

The first are those furnished civilian dependents in this country—government transportation; medical, dental and

mortuary service, schools, clubs, theaters; special banks; housing; food, gasoline, and oil supplied by the Government; and the protection of military police. All of those are available to dependents of every military installation in this country.

The second are a group of facilities furnished by the United States to civilian dependents abroad but not to such dependents in this country: special passports, special postal service, special customs privileges. These are amenities regularly extended to members of Congress and to high executive officials, but they plainly have no such bearing on status that their receipt can subject a civilian to trial by court martial.

The third class comprises privileges extended by foreign governments: admission to the country without a visa, tax exemptions, border crossing privileges, free importation of automobiles. Just how acts of a foreign country can transform American civilians into members of the American land and naval forces is not explained.

The Government says (U.S. Supp. Br. 27), "Because they are so closely identified with the armed forces, the local populace in the various foreign areas look upon and identify these civilians only as members of the American military community. * * * To the local population civilians and military are indistinguishable. As a corollary, the local populace naturally and rightly expects the military commander to supervise and control this civilian contingent."

Plainly, as has been pointed out (*supra*, pp. 26-29), no treaty with a foreign country could deprive of the right to a jury trial an American civilian who but for such treaty would have had that right. How then can foreign public opinion do so? It is assuredly strange doctrine to suggest, as the Government very plainly does in the passage just quoted, that the resolution of the present question of American constitutional law is to be left to

the judgment of the man in the street of another country."

Third. Are "All civilians who accompany the armed forces overseas" really "so closely identified with those forces as to be indistinguishable from them for all practical purposes" (U.S. Supp. Br. 25-26)?

We had supposed that one of the most galling features of overseas service, particularly in isolated areas or in countries with non-temperate climates, was the obligation to remain there, under pain of trial for desertion in the event that the soldier still thought that he could avail himself of the civilian privilege to quit an undesirable occupation at will.

Plainly, civilian employees are not subject to trial as deserters if they simply quit, pack up, and go home; they are not even within the terms of Art. 85, UCMJ, which is strictly limited to "Any member of the armed forces."

Does the Government consider this to be an immaterial difference?[17]

Fourth. It is argued at considerable length (U.S. Supp. Br. 6, 72, 75-76) that the presence of American armed forces abroad is a new feature rendering imperative a constitutional New Look that will reject the boundary of jury trial which was confirmed by the Bill of Rights as a bit of outmoded Eighteenth Century thinking that has no place in the changed world of the Twentieth Century. Cf. U.S. Reid Br. 44, where it was said that "the world about which Colonel Winthrop wrote no longer exists."

But this argument comes rather late in the day; there is nothing so very new about United States forces overseas. Ever since 1903, the United States has had under

[17] For obvious reasons, we need not here consider whether a wife leaving her overseas husband to await his return to the United States would be guilty of "desertion" in terms of domestic relations law.

lease a large naval base at Guantanamo in Cuba. 1 Malloy, *Treaties, Conventions, etc.* [S. Doc. 357, 61st Cong., 2d sess.] 358, 360. But it never occurred to the Navy, as late as 1937, that the presence of its forces there, on foreign soil, rendered civilians on the Guantanamo base triable by military tribunals in time of peace; the ruling then was that there was no such jurisdiction. OMO 11 of 1937, p. 18. And there is no showing that the cited opinion evoked any complaint from the Commandant at Guantanamo similar to the naval views now presented (U.S. Supp. Br. 115-129), to the effect that lack of court martial jurisdiction over civilian employees somehow jeopardized the success of his mission.

Fifth. Finally, the most conclusive point undermining the Government's present attempt to lump soldiers, civilian employees, and civilian dependents together is the circumstance that, as we demonstrate in detail below, pp. 150-152, civilian dependents have less immunity from foreign law under the NATO Status of Forces Treaty than do the other two groups. We there show that, as the explicit terms of that Treaty establish, primary jurisdiction over all criminal offenses committed by civilian dependents is conceded to the receiving state. There is no such concession as to all offenses committed by the others.

In view of all these factors, particularly in view of the oversight of the treaty provisions, it must be plain that what the Government is attempting is to change status, and thus to obtain jurisdiction, by assertion alone. Its arguments accordingly recall the cynical comment attributed to Aaron Burr: "Law is anything that is boldly asserted and plausibly maintained."

B. The Now Abolished Consular Jurisdiction Does Not Support the Present Trials by Court-Martial.

The cornerstone of the Court's opinion last June was the decision in *In re Ross*, 140 U.S. 453, which sustained the

validity of a non-jury trial before an American consular court in Japan. But the consular court was an historical survival, that rested on bases wholly different, as a matter of both our own constitutional law and of generally accepted international law, from those underlying courts-martial. Consequently, for quite a number of reasons, the *Ross* case, properly viewed, is not and cannot be authority for justifying the trial of civilians by court-martial in time of peace.

1. The only possible basis for sustaining the non-jury aspect of the consular jurisdiction, long moribund and now abolished, would be that it predated the Constitution, and is thus impliedly excepted from the guarantee of jury trial.

The origins of extraterritorial jurisdiction exercised by foreign diplomatic and consular officials over their own nationals who reside in the countries to which those officials are accredited may lie, as some have contended, in the dim mists of antiquity. See Ravndal, *The Origin of the Capitulations and of the Consular Institution*, S. Doc. 34, 67th Cong., 1st sess. (1921). Even in comparatively recent years there were significant distinctions between the extraterritorial jurisdiction exercised in Turkey and the regions formerly under Ottoman suzerainty and that obtaining elsewhere. See 2 Moore, *Digest of International Law*, 596. But certainly the basis for Western powers' maintaining and obtaining capitulatory rights in non-Christian countries, throughout the Nineteenth and Twentieth Centuries, was force. Those rights were, in consequence, resented; it became an object of nationalist ardor to cause them to be terminated; and when, one by one, they were finally relinquished, the territorial sovereign considered such relinquishment to be—as in fact it was—an accolade of international recognition of national maturity.

At one time or another, the United States enjoyed and exercised capitulatory rights in Borneo, China, Egypt, Ethiopia, Iran (Persia), Japan, Korea, Libya (Tripoli),

Madagascar, Muscat (Zanzibar), Morocco, Samoa, Thailand (Siam), Tunis and Turkey. 2 Moore, *Digest*, 593, 613, 722-727; 1 Moore, *Extradition*, 100-105, n. 5; 2 Hackworth, *Digest of International Law*, 530, 532.

We can trace the gradual abandonment of American extraterritorial jurisdiction abroad through the authoritative pages of the State Department Digests edited by *Moore* and *Hackworth*.[18] In some instances, conquest of the territory in question by a non-capitulatory power ended our extraterritorial rights; this was the case in Madagascar (2 Moore 637-638), Tunis (2 Moore 638), Zanzibar (*id.*; 2 Hackworth 534), Libya-Tripoli (2 Hackworth 534), and Samoa—where half of the islands passed to the United States and the other half to Germany (2 Moore 593).

In Egypt, our consular courts were replaced in 1876 by a system of mixed courts (see Brinton, *The Mixed Courts of Egypt*), until finally, effective 1938, we relinquished capitulatory rights in Egypt (2 Hackworth 512-517, § 180), although Article 3 of the multilateral treaty in question provided that the mixed courts were to continue until October 1949. 53 Stat. 1645, 1653.

In other countries, one by one, we gave up our rights by treaty. Extraterritorial rights in Japan were terminated by treaty signed in 1894, effective 1899 (2 Moore, 659-661), and, when Korea was annexed by Japan in 1910, that ended our extraterritoriality there also (2 Hackworth 533-534). We did not recognize Turkey's unilateral abolition of capitulations in 1914, but willingly did so by treaty signed in 1931 and proclaimed in 1933 (2 Hackworth 527-529, § 182). Capitulatory rights in Iran were relinquished in 1928 (2 Hackworth 532).

In Thailand, long known as Siam, the termination of our extraterritoriality was gradual. In 1920, jurisdiction over

[18] In order to avoid a multiplicity of citations on what are essentially collateral matters, we do not refer specifically to any treaties or agreements except those subsequent to the latter compilation.

Americans was committed to the Siamese courts, subject however to a right of evocation, viz., the power to recall particular cases back to American consular courts. But that right was never exercised, and in 1937 all extraterritorial rights were unconditionally surrendered. 2 Hackworth 532-533.

American extraterritorial rights in China were not given up until the Treaty of 1943, 57 Stat. 767. Similar rights in Ethiopia were abandoned in fact in 1937 when it was overrun by Italy (2 Hackworth 530). After Ethiopian liberation and subsequent to World War II, such rights were formally relinquished by a treaty, signed in 1951 and ratified in 1953, upon receipt of an assurance that Ethiopian courts would conform to Western standards of justice. TIAS 2864, 4 U.S. Treaties 2134. But in Morocco, as late as 1952, the United States successfully maintained, before the International Court of Justice, its extraterritorial jurisdiction in that country, civil and criminal, in all cases between American citizens, and in all cases where American citizens or protectees were defendants. See International Court of Justice, *Reports of Judgments*, 1952, p. 176; Bishop, *Case Concerning Rights of Nationals of the United States of America in Morocco*, 47 Am. J. Int. L. 136; Sweeney, *Treaty Rights of the United States in Morocco*, 25 Dept. of State Bull. 620.

This, however, was the dying gasp of what Judge Hudson has accurately characterized as "a moribund historical jurisdiction." Hudson, *The Thirty-First Year of the World Court*, 47 Am. J. Int. L. 1, 15. Only in Morocco did there exist the last vestige of American consular jurisdiction, and last summer Congress provided for the repeal of all remaining statutory provisions dealing with diplomatic and consular jurisdiction "effective upon the date which the President determines to be appropriate for the relinquishment of such jurisdiction." Act of August 1, 1956, Pub. L. 856, 84th Cong., 70 Stat. 773; see S. Rep.

2274, 84th Cong., 2d sess. All American consular jurisdiction in Morocco was accordingly relinquished on October 6, 1956. 35 Dept. of State Bull. 844 (Nov. 26, 1956).

It is thus a paradox, not without irony, that in the very same year that the Congress and the President acting jointly have abolished the consular jurisdiction, essentially because it was unsuited to present day world conditions, this Court should have relied upon that same "moribund historical jurisdiction" to justify trials by court martial that it was not prepared to rest on the power to govern the armed forces.[19]

Consideration of the constitutional basis for the consular jurisdiction long ago evoked a diversity of opinion, see 11 Cong. Rec. 409-417 (1881), and the question then put by Senator Carpenter of Wisconsin (p. 413), "whether this Government can derive any power denied to it by the Constitution from a treaty with a foreign nation?", cannot be said to have been answered by Secretary Blaine's reply, S. Ex. Doc. 21, 47th Cong., 1st sess.

Secretary Frelinghuysen's rationalization of the constitutional basis for the consular jurisdiction, a little later, was as follows (Sen. Misc. Doc. 89, 47th Cong., 1st sess., p. 14):

[19] This seems an appropriate juncture to point out once and for all the error at 351 U.S. 477-478, where it is said that "It was conceded before this Court that Congress could have established, or might yet establish, a system of territorial or consular courts to try offenses committed by civilian dependents abroad."

No such concession appears at Covert Br. 84, where "the continued vitality" of *Ross* was suggested as an "intriguing question" that was deemed not actually presented for reasons there set forth.

At the oral argument, the suggestion was plainly conditional, see Ward & Paul transcript, pp. 58-59: "Well, there is a fine opportunity to test the continued validity of the *Ross* case. *And if the Ross case is still good law, as he believes,* I see no reason why it is not possible to provide for a consular jurisdiction to try these persons who are accompanying the army overseas." [Italics added.]

Plainly, there was no such concession as the Court's opinion indicates.

"The Constitution, by its terms, is ordained and established 'for the United States of America.' The place in which laws of this class are in force are out of the United States and form no part of our domain.

"The Constitution and the laws of the United States, made in pursuance of it and treaties made under its authority, are to be the supreme law of the land; but not of any other land, nor for American citizens living in any other land."

This view was followed by the Court in the *Ross* case (140 U.S. at 464), where it was said that "The Constitution can have no operation in another country."

But that ground is plainly untenable. For, as was later said in *Balzac* v. *Porto Rico*, 258 U.S. 298, 312, "The Constitution of the United States is in force * * * wherever and whenever the sovereign power of that government is exerted." And, three times since then, the Court has qualified the statement in *Ross* so that it now reads—with italics added—"Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens*." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318; *United States* v. *Belmont*, 301 U.S. 324, 332; *United States* v. *Pink*, 315 U.S. 203, 226.

Of course, the Constitution operates outside of the United States. Plainly the President does not cease to be Commander-in-Chief of our overseas forces once they pass the national boundaries. Nor do American statutes cease to operate abroad when Congress intends them to affect American citizens there. See Covert Br. 82-83, where the references are collected. Very clearly, therefore, *Ross* cannot be sustained on the basis of the reasons therein set forth.

Nor, we submit, can the consular jurisdiction be supported on the footing that the consul is actually functioning as a judicial officer of the country to which he is accredited.

See 351 U.S. at 484-485; 11 Cong. Rec. at 410. When an American citizen is deprived of his life or liberty by officers of the United States, individuals whose powers rest on an American commission, those officers are not agents of a foreign nation. McIntyre,[20] the keeper of the Penitentiary of the State of New York at Albany, where *Ross* was held, was the "keeper of the United States" (cf. 351 U.S. at 489-490), not the keeper of the Mikado. When the American Consul-General hanged in the consulate at Shanghai an American citizen convicted of murder in the consular court, he was executing a warrant signed by the American Minister (*Diplomatic Correspondence, 1864* [H. Ex. Doc. 1, 38th Cong., 2d sess.], Part III, pp. 409-419; S. Ex. Doc. 21, 47th Cong., 1st sess., p. 7), a warrant that recited the Act of Congress pursuant to which the Minister was acting (*Dip. Corresp., supra*, pp. 415-416). The Consul General was in consequence enforcing American law, not acting as Lord High Executioner to the Emperor of China. All these individuals were exercising an *American* jurisdiction. The contrary assumption would lead to the plainly untenable conclusion that the United States Circuit Court for the Eastern District of Pennsylvania, in which *Wilberger* was tried (3 Wash. C. C. 515; 5 Wheat. 76), was a Chinese tribunal, or that the successor tribunal whose jurisdiction was in question in *United States* v. *Flores*, 289 U.S. 137, the United States District Court for the same district, was exerting judicial power that appertained to the King of the Belgians.[21]

There may be, however, a tenable basis for sustaining the consular jurisdiction, viz., that it was pre-constitutional.

[20] At 35 L. Ed. 581, *In re Ross* is entitled *Ross* v. *McIntyre*.

[21] Only the Mixed Courts of Egypt could be said to be exercising Egyptian sovereignty—but they were not American consular courts. See 2 Moore 722-727, § 286; 2 Hackworth 512-517, § 180. See also Brinton, *The Mixed Courts of Egypt*: "• • • the Mixed Courts are national courts" (p. 18), "they are part of the judicial system of the Egyptian state" (p. xxiv), and they existed side by side with certain foreign consular courts (pp. 288-293).

Provision for consular courts first appears in Articles 20 and 21 of the Treaty of Peace and Friendship between the United States and His Imperial Majesty the Emperor of Morocco (8 Stat. 100, 103; for a more exact translation, see 2 *Treaties and other International Acts of the United States of America* (Miller ed.) 185, 222-223). That treaty was signed on behalf of Morocco in 1786, and by John Adams and Thomas Jefferson on behalf of the United States in January 1787. It was ratified by the Continental Congress on July 18, 1787 (32 J. Cont. Cong. 353, 363-364)—at a time when the Constitutional Convention was in session. 2 Farrand 37-49.

But the Constitution did not go into effect until March 4, 1789. *Owings* v. *Speed*, 5 Wheat. 420. It is therefore plain that the consular jurisdiction is a pre-constitutional jurisdiction, established under the Articles of Confederation, and that, prior to 1789, American citizens abroad in countries granting a general extraterritoriality to the United States did not have a right to trial by jury before an American consul. It might therefore be argued that a consular trial is impliedly excepted from the constitutional guarantees of jury trial, just as are trials by court-martial of military personnel (*Whelchel* v. *McDonald*, 340 U.S. 122, 126-127), trials of petty offenders by judges of inferior courts (*District of Columbia* v. *Clawans*, 300 U.S. 617), trials by the court alone of persons charged with contempt (*In re Debs*, 158 U.S. 564, 594-596), and trials by military tribunals of offenders against the laws of war (*Ex parte Quirin*, 317 U.S. 1, 38-41).

Those persons—soldiers, petty offenders, contemnors, war criminals, Americans in countries granting complete extraterritorial rights to the United States—may be said to be outside the constitutional guarantees of jury trial because when the Constitution was adopted their cases were not of the category triable by a common law jury. Only on this footing, we submit, is it possible to sustain the decision in *In re Ross*, 140 U.S. 453.

But even on the only basis on which it can be supported, the *Ross* case does not control here, for two additional reasons:

First, the very reason why Ross could properly be tried by a non-jury consular court is also the reason why Mrs. Smith and Mrs. Covert could not be properly tried by a court-martial: In 1789, persons in Ross's situation had no right to trial by jury, while those in the two women's situation did have such a right. *Supra*, pp. 36-54.

Second, whereas in *Ross* there was an Act of Congress specifically declaring criminal what Ross had done, in these cases, once inquiry into the Clause 14 power is put to one side, there is no such Act. *Intra*, pp. 102-106.

2. Unlike consular jurisdiction, which rested on express treaty provisions, extraterritorial jurisdiction over military personnel flows, so the United States long contended, from accepted doctrines of international law.

Extraterritorial jurisdiction exercised by one nation over all of its citizens present in the territory of another—the now abandoned consular jurisdiction was derived from express treaty provisions. 2 Hackworth 493, § 177. But extraterritorial jurisdiction exercised by one nation over its military personnel within the territory of another was based, so the United States long contended, on a rule of international law, viz., the doctrine that the territorial sovereign's consent to the entry of the foreign forces necessarily implied a consent to their immunity from the processes of any of the territorial-sovereign's courts.

The foundation of that doctrine, so far as the United States was concerned, was Chief Justice Marshall's opinion in *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 139-140:

> "3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

"In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

The doctrine of the extraterritoriality of friendly foreign armed forces was again set forth by this Court in *Coleman* v. *Tennessee*, 97 U.S. 509, 515, and in *Dow* v. *Johnson*, 100 U.S. 158, 165. It was similarly recognized by the British Privy Council in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160, where Lord Atkin at p. 168 referred to Chief Justice Marshall's opinion in *The Schooner Exchange* as "a judgment which has illumined the jurisprudence of the world." None the less, the Privy Council's acceptance of the rule was a grudging one, and in the actual decision their lordships spelled out a waiver of the immunity from distinctly equivocal acts.

Other countries, too, recognized the doctrine. The Supreme Court of Justice of the Republic of Panama did so in 1925 in the case of *Republic of Panama* v. *Schwartzfiger*, 21 Am. J. Int. L. 182, 184, where it held that an American soldier on duty in the Canal Zone was not subject to Panamanian jurisdiction when he crossed over the Zone boundary into Panamanian territory:

"It is a principle of international law that the armed force of one state, when crossing the territory

of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command."

The principle of military extraterritoriality was recognized also by text writers of various nationalities. In the interest of brevity, it seems desirable simply to incorporate by reference the very complete citation of these authorities in Colonel Archibald King's now classic paper, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. L. 539, published in 1942, which concluded (p. 567) that "the general principle is abundantly established by reason, authority, and precedent, that the personnel of the armed forces of Nation A, in Nation B by the latter's invitation or consent, are subject to the exclusive jurisdiction of their own courts-martial and exempt from that of the courts of B unless such exemption be waived. That principle has already been expressly recognized by several of the United Nations."

That article purported to be, with due regard for the proprieties, an expression of individual views, but in fact, in view of "the important role played by its author in negotiating during the war a series of agreements securing special immunities for visiting American troops abroad" (Brinton, *The Egyptian Mixed Courts and Foreign Armed Forces*, 40 Am. J. Int. L. at 737), it represented the position of the United States throughout World War II.

It was on the basis of the doctrine of complete military extraterritoriality that the United States obtained from the British the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31 (U. S. Reid Br. 74-84), as well as similar agreements and/or concessions from other nations.

It is true that Mr. Anthony Eden (as he then was) made reference to "the very considerable departure which the

above arrangements will involve from the traditional system and practice of the United Kingdom" (U. S. Reid Br. 79), and that in the parliamentary debates reference was made to the bill as a "striking innovation" and as being "of a completely revolutionary character." King, *supra*, at 558; and see Goodhart, *The Legal Aspect of the American Forces in Great Britain*, 28 A.B.A.J. 762. But all of the foregoing statements require qualification.

In the first World War, the British extended to American troops a similar immunity in fact, but never in law; protracted negotiations on the subject in 1917-1918 did not result in any formal agreement. King, *supra*, 551-553. Thereafter, and throughout World War II, the arrangements under which other foreign forces in Britain operated did not give those other forces immunity from local law. See Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. V, c. 6); Allied Forces Act, 1940 (3 & 4 Geo. VI, c. 51); Schwelb, *The Status of Soviet Forces in British Law*, 39 Am. J. Int. L. 330. A number of Canadian soldiers, for instance, were tried, convicted, and hanged after trials for murder in British courts. Stacey, *Six Years of War* (Vol. 1 of the Official History of the Canadian Army in the Second World War) 426, note.

To that extent, it is true, the complete immunity enjoyed by American troops in Britain during World War II and until 1954 (Covert Br. 98, note 67) did represent a "very considerable departure." But the British had always obtained from other nations—from France in World War I, and from Egypt and Iraq thereafter—the same immunity from local jurisdiction that they accorded American forces from 1942 to 1954. See King, 36 Am. J. Int. L. at 533; King, *Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces*, 40 Am. J. Int. L. at 257. And while in fact that difference reflected the normal consequences of a stronger power dealing with a weaker one, complete immunity had the support, not only of the British

writers on international law (King, 36 Am. J. Int. L. at 544-546; King, 40 Am. J. Int. L. at 264), but also of the judgment of the Privy Council in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160. The "departure" thus came actually only to this, that Britain felt constrained to concede to the United States what it had denied to others at home but had always obtained for itself abroad.

The difference between capitulations and consular jurisdiction on the one hand, and military extraterritoriality on the other, is strikingly underscored by the relations between the United States and China during World War II. Effective May 20, 1943, we gave up, by treaty (57 Stat. 767), the extraterritoriality we had enjoyed there for nearly a century, since 1844. But as of the very next day, an executive agreement recognized the complete extraterritoriality of our armed forces in China with respect to criminal offenses. 57 Stat. 1248. The Chinese Ministry of Foreign Affairs said, in connection with the latter arrangement, (9 Dept. of State Bull. 114):

> "According to international law and international practice, when the armed forces of the Allied Nations are stationed in the territory of another for the purpose of undertaking joint military operations, exclusive criminal jurisdiction over members of such forces is exercised by the military or naval courts or authorities of the country to which such forces belong."

In most other countries, the United States enjoyed complete military extraterritoriality without formal agreement. Thus, in Brazil, the Supreme Court of that nation recognized the immunity. King, 40 Am. J. Int. L. at 262-263. In certain other countries, military extraterritoriality was made the subject of executive agreement; see 58 Stat. 1129 (India); 58 Stat. 1215 (Belgian Congo); 57 Stat. 1197 (Egypt), and note that in the latter instance (57 Stat. at 1197), "It is understood that the wives and children of the members of the United States Forces do not benefit

hereby from any immunity from jurisdiction and will be amenable to the jurisdiction of Egyptian courts."[22]

In Canada, however, the Supreme Court of the Dominion refused by a vote of 3 to 2, in three separate opinions, to recognize the full scope of Chief Justice Marshall's doctrine. *Reference re Exemption of U. S. Forces from Canadian Criminal Law*, [1943] S.C.R. 483; [1943] 4 D. L. R. 11. In fact, the arrangement arrived at secured the same effect by Order in Council. King, 40 Am. J. Int. L. at 274-275. And at the leased Atlantic bases, under Art. IV of the Base Lease Agreement negotiated in 1940-41, American forces had as a matter of law only a qualified immunity. 55 Stat. 1560, 1562. Similarly, the American legislation for reciprocal court-martial privileges for allied armed forces in the United States (Service Courts of Friendly Foreign Forces Act, 1944 [58 Stat. 643; 22 U.S.C. §§ 701-706]) which had been promised in 1942 by Ambassador Winant (U. S. Reid Br. 80-81 (57), 84), did not confer on British or Canadian troops in the United States, to whom alone it was made applicable (Proclamation No. 2626, 9 Fed. Reg. 12403), the same immunity that American forces enjoyed in Britain. U. S. Reid Br. 54-55, n. 28.

None the less, Colonel King could summarize the World War II experience in these terms (40 Am. J. Int. L. at 278):

> "The foregoing survey of the history of the last three years as to jurisdiction over friendly foreign forces shows that when our troops have been on allied territory the United States has uniformly obtained exclusive criminal jurisdiction over them in its courts-martial. Great Britain has done the same as to her forces on friendly foreign soil. Some of our smaller

[22] The immunity of most other foreign forces in Egypt, the British alone excepted (King, 36 Am. J. Int. L. at 547, 553, and, 40 Am. J. Int. L. at 257), extended only to acts done in *service commandé* (i.e., in line of duty on official business). See Brinton, *Jurisdiction over Members of Allied Forces in Egypt*, 38 Am. J. Int. L. 375; Brinton, *The Egyptian Mixed Courts and Foreign Armed Forces*, 40 Am. J. Int. L. 737.

allies, whose governments and forces have been in exile, have not been so fortunate. Though their courts martial have been permitted to sit, some of the host countries have undertaken to limit the powers of those courts and have insisted on the concurrent jurisdiction of the local criminal courts over the visiting forces.

"The courts of several countries have considered the problem. They have all quoted or cited Chief Justice Marshall's opinion in the case of *The Exchange*, nearly always with agreement, and often with praise; but have shown considerable reluctance to apply Marshall's doctrine against their own country, and a disposition—perhaps unconscious—to find the particular case before the court not within the scope of that doctrine."

After the war, therefore, American doctrine had sufficiently hardened so that, in successive editions of the *Manual for Courts-Martial*, prescribed by Executive Order of the President, it was set forth in these terms (MCM, U.S. Army, 1949, ¶11, p. 11; MCM, U.S. Air Force, 1949, ¶11, p. 11; MCM, U.S. [all services], 1951, ¶12, pp. 16-17):

"Under international law, jurisdiction over members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and it not a right of the individual concerned."

On the foregoing basis, it is plain that the provisions in the NATO Status of Forces Treaty, and the corresponding provisions of the Administrative Agreement with Japan, under which the sending state concedes to the receiving state primary criminal jurisdiction over offenses by members of the sending state's forces that do not involve official duties (Covert Br. 103), all rest on the principle of waiver.

But to have supported the NATO Status of Forces Treaty on the basis of a waiver might well have evoked a considerable opposition, in the light of the prevailing climate of opinion with reference to the scope of the treaty power. Accordingly, it was argued in support of the Treaty that there never was any rule of automatic immunity, and that even the qualified immunity obtained under the NATO Treaty amounted to a concession made to the United States by the other NATO countries. *Agreements Relating to the Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters*, Hearings before the Senate Committee on Foreign Relations, April 7 and 8, 1953, pp. 56, 66; *Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty*, Supplementary Hearing before the Senate Committee on Foreign Relations, June 24, 1953, pp. 38-56, 68, 72-77. Thus it was said, in a memorandum presented to the Committee at the latter hearing (p. 54) and later reprinted under the name of its actual author (Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 Col. L. Rev. 1091, 1111):

> "It has been claimed that under international law friendly foreign forces are immune from the criminal jurisdiction of the receiving state for crimes committed therein. This contention is without [substantial] foundation."*

To call that conclusion backtracking is to understate the case substantially. Actually, the position of the supporters of the treaty involved a thoroughgoing repudiation of Marshall, C. J., of the President's 1949 and 1951 *Manuals for Courts-Martial*, and of the position energetically and consistently put forward by the United States all during World War II—all to the point of stultification, and perhaps beyond. It does not require unusual prescience to predict that the position taken by the supporters of the

* The bracketed word appears in the Columbia Law Review article but is not in the memorandum that was presented to the Senate Committee.

NATO Treaty before the Senate Committee will long haunt every American effort to obtain even minimal immunity for American forces in any foreign country, however small or weak.

A more realistic approach was that of Professor Re, who concluded (*The NATO Status of Forces Agreement and International Law*, 50 N.W. L. Rev. 349, 392):

> "Sound legal analysis, therefore, would require the conclusion that although a certain immunity exists for foreign friendly visiting forces, the extent of the immunity is strictly a matter of agreement."

Certainly, "when we wash it with cynical acid" (Holmes, "The Path of the Law", in *Collected Legal Papers*, 167, 174), the immunity situation reduces itself to a question of who needed whom most. The British needed United States forces far more than they needed those of the Commonwealth, the Soviet, or the governments in exile, hence the former enjoyed a wider immunity (*supra*, pp. 74-75). All of the smaller allies needed United States forces sufficiently to recognize their complete immunity (*supra*, pp. 72, 75-76). On the other hand, the United States did not need the others nearly so much, and hence extended less to our allies that we got in return (*supra*, p. 76), though we considered our stake in NATO sufficiently high so that we were willing to take less under the NATO Status of Forces Agreement—or were prepared to waive rights for which we had theretofore consistently contended—in order to complete the NATO arrangements.

Consequently, while in this field, also, "There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both" (*United States* v. *Flores*, 289 U.S. 137, 158), it is plain that military extraterritoriality depends on some form of consent, at the very least on the consent to the entry of the foreign

forces. The disagreements outlined above do not extend to that proposition, but go simply to whether the immunity flows automatically from the consent to entry of the troops, whether it flows from a specific agreement to concede immunity, or whether there is some middle ground.

On any basis—and this is the point material here—on any basis, military extraterritoriality, in whatever form exercised, involves a consent by the territorial sovereign to the exercise of jurisdiction by the personal sovereign, and does not in any sense involve, as the Court last June mistakenly assumed (351 U.S. at 473-474, 479), a cession of jurisdiction by the territorial sovereign to the personal sovereign.

And, although in the consular court situation there have been suggestions, however erroneous, that the foreign consul is *pro tanto* a judicial officer of the country in whose territory he exercises jurisdiction (*supra*, pp. 68-69), no such suggestion has ever been made in the military situation. Nor could it be; after all, the prosecution in the *Covert* case was, not *Regina* v. *Covert*, but *United States* v. *Covert* (R. 12, 62, 97; No. 701), and that in the *Krueger* case similarly *United States* v. *Dorothy Krueger Smith* (R. 23, 47, 52; No. 713), and not *Emperor* or *Empire of Japan* v. *Smith*.

Consequently, for these reasons also, assuming for purposes of argument that the consular jurisdiction is still valid, it would not and could not justify or sustain the military jurisdiction that is in issue in the present cases.

C. The Courts-Martial Here Involved Cannot be Sustained as Legislative Courts.

The rationale of the Court's opinion last June is that the courts-martial here involved can be constitutionally justified as legislative courts. Such a characterization disregards history, wholly overlooks the essential functional difference between courts-martial and true legislative

courts, and, far from reaching the question of Congressional power, actually obscures it with a label, since the circumstance that a particular court is properly described as legislative does not necessarily dispense with the requirement of a jury in criminal cases or with other Bill of Right protections.

1. Prior to June 1956, a court-martial was never considered to be a legislative court.

It can easily be demonstrated that, prior to June 11, 1956, when the Court's opinions in the present cases were announced, no one—"no one but no one," as the huckster has it—ever for one moment considered a court-martial to be a legislative court.

Congress certainly did not. Throughout its lengthy consideration of the Uniform Code of Military Justice, for a period of well over a year, there is not only no suggestion that Congress or any of its Committees or members were choosing between types of legislative tribunals, but every item of the legislative history establishes that it was not. That history establishes beyond effective contradiction that Congress considered itself to be proceeding under its power to govern the armed forces; that it accordingly acted through its Committees on Armed Services; that the Senate voted down a proposal to refer the Code to another committee; and that in enacting Art. 2(11), UCMJ, the sponsors of the bill—along with its departmental drafters—announced that they were simply carrying forward AW 2(d) as it had stood since 1916. Voluminous references are collected in Covert Br. 64, n. 50, and 93-95; Pet. Reh. 4-6; and pp. 21-26, 54-57, *supra*, which will not be again set forth. Nowhere, at no time, was there any mention of courts other than courts-martial; nowhere, at no time, was there even the faintest whisper of any suggestion concerning consular courts; and no one, nowhere, at any time, cited the *Ross* case in any connection.

The foregoing omissions will hardly occasion surprise among any persons familiar either with the nature of a court-martial or with this Court's decisions on the subject of legislative courts.

The traditional view regarded the court-martial, not as a species of legislative court, but as "a purely executive agency designed for military uses," which is "called into existence by a military order," such order being "a direction to certain officers named to assemble at a certain time and place and form a court for the trial of a person or persons specifically or in general terms indicated • • •" Winthrop, *54-55, *229 (reprint, pp. 49-50, 158). "Courts-martial are creatures of orders; the power to convene them being an attribute of command. • • • the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the Articles of War." *Runkle* v. *United States*, 19 C. Cls. 396, 409, reversed on other grounds, 122 U.S. 543. Even today, see MCM, 1951, ¶36*b*, "A court-martial is created by an appointing order issued by the convening authority." We point out below, pp. 83-86, how the functional differences between courts-martial and genuine legislative courts transcend considerations of mere nomenclature.

Moreover, in the exhaustive listing of courts then deemed legislative that appears in *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, there is no reference to courts-martial as being properly included in that category. Similarly, there is no reference to courts-martial in the briefs in that case (No. 17 Orig., Oct. T. 1928), nor in the opinions and briefs in the later cases dealing with legislative courts, *O'Donoghue* v. *United States*, 289 U.S. 516; *Williams* v. *United States*, 289 U.S. 553 (Nos. 728-730, Oct. T. 1932).

True, the Court in *O'Donoghue* disapproved the *Bakelite* dictum (279 U.S. at 450) that the courts of the District of Columbia were legislative tribunals, and held them to be

constitutional courts. The further *Bakelite* dictum (279 U.S. at 452-455) that the Court of Claims was a legislative court was reaffirmed in *Williams*. But about a decade later, the Government itself argued that *Williams* was wrong (Brief for the U.S. in *Pope* v. *United States*, 323 U.S. 1 [No. 26, Oct. T. 1944]), and in 1953 Congress expressly declared the Court of Claims to be a constitutional court created under Article III. Section 1 of the Act of July 28, 1953, c. 253, 67 Stat. 226, amending 28 U.S.C. § 171.

It may well be, therefore, that the *Bakelite* case today is valid only within a limited sphere. But until June 1956 it never occurred to anyone that the Court's *Bakelite* opinion was also deficient in not including courts-martial in its enumeration of what were then considered to be legislative tribunals.

2. A court-martial is an executive rather than a legislative court since its judgments are inchoate until reviewed and acted upon by an executive officer.

The reasons why a court-martial is an executive tribunal are essentially functional.

First. A court-martial is an *ad hoc* tribunal created by a military order (*supra*, p. 82; see R. 22 in No. 713), whereas every legislative court of which we are aware is a body of more or less permanence that is established by Act of Congress.

Second. It is perfectly possible for the judgment of a legislative court to be within the appellate jurisdiction of the Court. E.g., *De Groot* v. *United States*, 5 Wall. 419 (Court of Claims); *United States* v. *Coe*, 155 U.S. 76 (Court of Private Land Claims). It is only when the matter dealt with by what is assumed to be a legislative court does not present a "Case" or "Controversy" (*Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693), or when the judgment of the legislative court is subject to revision by

Congress (*In re Sanborn*, 148 U.S. 222) or by an executive officer (*Gordon* v. *United States*, 2 Wall. 561, 117 U.S. 697) that this Court is without appellate jurisdiction.

But while, as the history of the Court of Claims shows (cf. *Gordon* v. *United States* with *De Groot* v. *United States*, both *supra*), there is no essential reason why the judgment of a legislative court cannot be invested with such finality as to be reviewable here, the very nature of a court-martial precludes any such possibility.

The judgment of a court-martial is inchoate until it has been approved by the final reviewing authority. To quote Winthrop, *683 (reprint, p. 447):

> "While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him."

Thus, where such officer has not been shown to have acted, the proceedings of the court-martial remain a nullity. *Runkle* v. *United States*, 122 U.S. 543. Before approval, the sentence is "interlocutory and inchoate only." *Id.* at 555.[23]

Even today, every proceeding of every court-martial must be laid before the officer appointing the court for his personal action. Arts. 60, 64, UCMJ (10 U.S.C. §§ 860,

[23] Later cases, which professed to find indicia of personal action by the reviewing authority in situations factually very similar to that presented in *Runkle* (*United States* v. *Page*, 137 U.S. 673; *United States* v *Fletcher*, 148 U.S. 84; *Ide* v. *United States*, 150 U.S. 517) do not purport in any degree to vary the principle of *Runkle* that such action is necessary to make the sentence operative.

864);[24] MCM, 1951, ¶¶ 84-91. And notwithstanding the full panoply of appellate review provided by the UCMJ, in death, dismissal, and general and flag officer cases, where Presidential or Secretarial action is required by Arts. 71(a) and 71(b); 10 U.S.C. §871, it is the act of the officers, not the decision of the Court of Military Appeals, which is necessary before those sentences can be carried into execution. That this further requirement is not a simple matter of executive clemency is demonstrated by current General Court-Martial Orders.

A death sentence, which must be automatically reviewed by the Court of Military Appeals pursuant to Art. 67(b)(1), 10 U.S.C. § 867(b)(1), must still be ordered executed by the President. E.g., GCMOs 67 and 68, D A, 1954; *id.*, Nos. 64-66 of 1953; *id.*, Nos. 58-59 of 1952. Contrariwise, even after the Court of Military Appeals has denied a petition for grant of review, so that the judicial appellate process is completed, the Secretary or his designee can still disapprove the sentence and dismiss the charges. E.g., GCMO 24, D A, 1956. Such action is wholly distinct from powers of clemency, the exercise of which is indicated in the note.[25]

Moreover, as *Wade* v. *Hunter*, 336 U.S. 684, shows, the military officers appointing a court-martial may withdraw a case from the court-martial, and terminate the tribunal's power to proceed without thereby placing the accused in

[24] We cite the new U. S. Code references from Chapter 47 of the Act of August 10, 1956, c. 1041, 70A Stat. 1, 36, which by virtue of §51 of that Act (70A Stat. 640) took effect on January 1, 1957.

[25] Commutation of death sentences by the President: E.g., Nos. 1 and 27 of 1956. Administrative discharge substituted for dismissal pursuant to Art. 74(b), UCMJ: E.g., No. 28 of 1956; Nos. 24 and 47 of 1955; Nos. 25, 26, 27, and 90 of 1954. Portion of sentence remitted: E.g., Nos. 11 and 29 of 1956. All citations are to Department of the Army General Court-Martial Orders, which recite in each instance the appellate steps taken, election not to seek review, petition for review denied, or affirmance or reversal by the Court of Military Appeals, as the case may be.

jeopardy. Cf. Art. 44(c), UCMJ; 10 U.S.C. § 844(c). No comparable power is lodged in any officer with respect to cases under consideration by legislative courts.

This Court has refused to review judgments of military tribunals on direct review on the ground that they were not Article III courts. *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U.S. 126. But, as we have seen, it has reviewed the judgments of numerous kinds of legislative courts (*supra*, pp. 83-84), and it has similarly reviewed civil causes that originated in military government courts and that were later legislatively transferred to civilian courts, both constitutional and legislative. *The Grapeshot*, 9 Wall. 129; *Santiago v. Nogueras*, 214 U.S. 260. Similarly, there has never been any difficulty in reviewing the judgments of the Tax Court of the United States, which is "an independent agency in the Executive Branch of the Government" (26 U.S.C. § 7441), or of its predecessor, the Board of Tax Appeals. See *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716.

It follows, we think, that the true basis for this Court's inability to review the judgments of military tribunals directly is that they are executive tribunals in the functional sense that all of their proceedings must be reviewed by an executive officer as a prerequisite to the validity of their findings and sentences.

The result is that, by their very nature, courts-martial never were, are not now, and cannot ever be, legislative courts.

3. To speak of courts-martial as legislative courts does not settle the question of Congressional power but simply obscures it.

Even if it be assumed for purposes of argument that a court-martial is still somehow a legislative court, such an assumption does not settle the present problem.

The basis of legislative, as distinguished from constitutional Article III courts, is that "other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution." *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. So, assuming that a particular power exists, Congress can, subject to applicable constitutional limitations, create a legislative court—and this brings the matter squarely back to the issue not faced in June.

If a court-martial is deemed to be a legislative court, there is no difficulty under the present assumption on the footing that such a tribunal is a legislative court created under the Clause 14 power to govern the armed forces. But if inquiry into the scope of that power is avoided, simply to call a court-martial a legislative court does not establish the power of such a tribunal to try civilians who manifestly are not a part of the land and naval forces.

Just as the legislative courts created for the territories "are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited," for the expressed reason that "They are incapable of receiving it." (*American Ins. Co. v. Canter*, 1 Pet. 511, 546, quoted in *Bakelite*, 279 U.S. at 450), so courts-martial are not legislative courts in which the power to try persons not members of the land and naval forces can be deposited. They are incapable of receiving it.

The short of the matter is that to talk of legislative courts in the present connection is to proceed in a most unprofitable circle.

4. The circumstance that a particular tribunal is a legislative rather than a constitutional court does not automatically dispense with the requirement of a jury trial in criminal cases.

The Court last June said (351 U.S. at 479), "We find no constitutional defect in the fact that the Code [of Military Justice] does not provide for indictment by grand

jury or trial by petit jury. In these respects it does not differ from the procedures specifically approved by this Court in other types of legislative courts established thereof by Congress. *In re Ross*, [140 U.S. 453]; *Hawaii v. Mankichi*, 190 U.S. 197; *Dorr v. United States*, 195 U.S. 138; *Balzac v. Porto Rico*, [258 U.S. 298]."

We submit that the foregoing is fundamentally erroneous because it fashions into a principle of general application two particularized exceptions that rest on bases wholly different from those underlying the courts-martial here involved.

First. The error of the assumption made last June can be initially demonstrated by examining some present-day territorial courts.

The District Court of Alaska is, for certain purposes (e.g., 28 U.S.C. § 460), a United States Court; the Federal Rules of Civil Procedure apply to proceedings therein (48 U.S.C. § 1063a); and it has the jurisdiction of district courts of the United States (48 U.S.C. § 101). But the judges of that court are appointed, not during good behavior, but for only four year terms (48 U.S.C. § 112), and they are removable by the President (*id.*; *McAllister v. United States*, 141 U.S. 174). It seems clear, also, that their compensation may be diminished during their continuation in office. See *United States v. Fisher*, 109 U.S. 143; cf. *Williams v. United States*, 289 U.S. 553. And they have functions that are administrative rather than judicial. *Application of L. B. & W. 4217*, 238 F. 2d 163 (C.A. 9).

Plainly, then, the District Court of Alaska is a legislative court in the classic pattern of territorial courts. *American Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235. But it does not follow, as the Court assumed last June, that this circumstance means that criminal causes therein can be tried before anything other than a common law jury. The decision in *Rassmussen v. United States*, 197 U.S. 516, which held invalid a criminal trial in Alaska

before a jury composed of only six jurors, establishes the precise contrary. And therefore it plainly follows that so much of Art. 2(11), UCMJ, as purports to subject to military law civilians accompanying the armed forces in that portion of Alaska that is west of longitude 172 degrees west is unconstitutional on its face.[26]

Similarly, in other territorial courts, which plainly were legislative rather than constitutional, it was uniformly held that a criminal defendant was entitled to a jury trial by a common law jury. E.g., *Reynolds v. United States*, 98 U.S. 145, and see cases cited in *Balzac v. Porto Rico*, 258 U.S. at 304.

Otherwise stated, it does not follow from the circumstance that the judge of a territorial court cannot invoke Article III to prevent his removal from office, or to claim tenure for life, or to protect his salary against reduction, because he presides over a legislative rather than a constitutional court, that the defendant haled before him in a criminal case is unable successfully to assert his right to trial by a common law jury. Yet this is precisely the conclusion that was drawn in the Court's opinion last June.

Second. As we have shown (*supra*, pp. 69-70), the consular court involved in *Ross* had an ancestry more ancient than either the original Constitution or the Bill of Rights. Diplomatic agents functioning under the government established by the Articles of Confederation had agreed, in 1786-87, to the trial of American citizens before an American consul in Morocco. Since such citizens abroad

[26] Whether the objection to Arts. 2(11) and 2(12) of the Uniform Code as originally enacted, that it subjected civilians on Guam to court-martial (96 Cong. Rec. 1435), was well taken, is a question that has become moot, not so much perhaps because of the decisions that held Guamanians entitled to all constitutional guarantees (*infra*, p. 96), but because Congress has since amended Arts. 2(11) and 2(12) so as to exclude Guam therefrom. Sec. 23 of the Act of Aug. 1, 1956, Public Law 896, 84th Cong., 70 Stat. 908, 911.

in countries that granted the United States capitulatory rights had therefore no right in 1789-1791 to trial by a common law jury, it could therefore be argued that the dual constitutional guaranty of jury trial in Art. III, Sec. 2, and in the Sixth Amendment, which preserved only the *status quo*, did not confer what had previously not existed. It could therefore be contended that the American tried by a consul in non-Christian lands could not found a successful claim to a jury trial on the Constitution (*In re Ross*), any more than a soldier in uniform could when tried by a court-martial (*Whelchel* v. *McDonald*, 340 U.S. 122, 126-127), or than a petty offender (*District of Columbia* v. *Clawans*, 300 U.S. 617) or a contemnor (*In re Debs*, 158 U.S. 564, 594-596) could when tried by a court without a jury, or than a spy or war offender could when haled before a military commission (*Ex parte Quirin*, 317 U.S. 1, 38-41). All such individuals subject to non-jury trials when the Constitution was adopted were impliedly excepted from the Sixth Amendment's guarantees.

Here, however, just the opposite situation obtains: Civilian wives were not triable by court-martial in time of peace in 1789 or in 1791 or before, so that they fall squarely within the guarantee.

Third. We turn now to the three Insular cases—*Mankichi*, *Dorr*, *Balzac*—that were cited by the Court last June (351 U.S. at 479).

1. While of course a territory or possession exerts the sovereignty of the United States, so that a federal trial following a territorial trial for the same offense involves double jeopardy (*Grafton* v. *United States*, 206 U.S. 333) whereas a federal trial following a state trial does not (*United States* v. *Lanza*, 260 U.S. 377), it is still demonstrably wrong to say (351 U.S. at 479) that the three Insular cases in question involved "types of legislative courts established abroad by Congress." For, in each instance, the non-jury trial was had in a local tribunal that

had been established and was in existence long before the territory or possession in question passed under American sovereignty.

a. Thus, Mankichi was charged by information dated May 4, 1899 (R. 1-2, No. 219, Oct. T. 1902) and was convicted by the verdict of 9 out of 12 jurors on May 18, 1899 in the Circuit Court of the First Circuit of Hawaii (R. 7). This was almost a year before the Hawaiian Organic Act of April 30, 1900, c. 339, 31 Stat. 141, and in a tribunal that had existed as early as 1859. See Civil Code of Hawaii, 1859, c. XIV (Of the Circuit Courts); Hawaii Compiled Laws, 1884, c. XIV (*id.*); Laws of Hawaii, 1892, c. 57, §§ 29-30; Ballou's Civil Laws of Hawaii (1897) §§ 1135-1137.[37] Indeed, the Organic Act simply recognized the existence of the circuit courts and did not purport to re-establish them. See 81, 31 Stat. at 157, now 48 U.S.C. § 631; cf. *Caplet* v. *Goar*, 197 U.S. 348.

b. Similarly, Dorr was tried in the Court of First Instance of the City of Manila (R. 1, No. 583, Oct. T. 1903), again a tribunal whose existence and jurisdiction were recognized rather than established by the first Congressional enactment that created a civil government for the Philippines. See 9 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 695.

c. Balzac was likewise tried in an insular court, the District Court of Arecibo, Puerto Rico (R. 1, No. 178, Oct. T. 1921; R. 1, No. 179, Oct. T. 1921). In this instance, also, the first Puerto Rican Organic Act simply recognized the courts of Puerto Rico that were "already established and now in operation." See 33 of the Act of April 12, 1900, c. 191, 31 Stat. 77, 84.

2. And the true basis for sustaining the non-jury trials in the three cases was, not that the Constitution is not in

[37] The development and growth of the Hawaiian legal system is considered in U. S. Br. 47-54, Point II C 2, in No. 429, Oct. T. 1946 (*United States* v. *Fullard-Leo*, 331 U.S. 256).

force overseas, to the contrary, "The Constitution is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted" (*Balzac v. Porto Rico*, 258 U.S. at 312)—not that juries can automatically be dispensed with once the three mile limit is passed or simply because the tribunal before which the accused is haled can be said to be a legislative court, but because neither the grand jury nor a common law petit jury had formed a part of the new possession's ancient institutions.

a. Thus, in Hawaii, prosecutions by the Attorney General rather than by grand jury indictment had been the practice since 1847, while verdicts by non-unanimous juries dated from 1842. See *Republic of Hawaii v. Edwards*, 11 Haw. 571, 579-580, a case decided after annexation, in November 1898. While the habeas corpus proceeding that was before this Court on appeal was initiated subsequent to the date of the Organic Act (*In the Matter of Mankichi*, 1 U. S. Dist. Ct. Haw. 303), Mankichi's prosecution in the Circuit Court preceded that enactment (*supra*, p. 91), and therefore, as the Solicitor General argued (Points Made in Oral Argument, No. 219, Oct. T. 1902, p. 7), "It is not to be presumed that it was intended to tear down the old house before it was even known a new one would be needed."

And this Court sustained the proceedings on that footing, viz., that the Constitution did not require the automatic uprooting of institutions native to Hawaii:

> "Until then [the Republic of Hawaii] was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and

was adopting a new procedure for which it had had no opportunity of making preparation.

* * * * * * *

"We * * * say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands; and well calculated to conserve the rights of their citizens to their lives, their property, and their well being." *Hawaii* v. *Mankichi*, 190 U.S. 197, 216, 217-218.

b. Similarly, it was held, with respect to the Philippines and Puerto Rico, that the Constitution did not force into the straightjacket of the common law system and tradition of jury trial Spanish-speaking lands that the United States had acquired by conquest.

"* * * if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition." *Dorr* v. *United States*, 195 U.S. 138, 148.

"Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete juridical system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. * * *

the United States has been liberal in granting to the islands acquired by the Treaty of Paris, most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it." *Balzac* v. *Porto Rico*, 258 U.S. 298, 310, 311.

There was every reason to hold that the Constitution did not, *ex proprio vigore* and without Congressional action, disturb a system of law long established in Hawaii, and that grand juries and unanimous verdicts of petty juries, which were indeed instituted by § 83 of the Organic Act, now 48 U.S.C. § 635, were not necessary in courts existing prior to annexation before Congress acted. There was similarly every reason to hold that the common law jury system should not be deemed automatically imposed on the Philippines, an archipelago peopled by many tribes but little removed from savagery. "The jury system needs citizens trained to the exercise of the responsibilities of jurors. * * * [It] postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire." *Balzac* v. *Porto Rico*, 258 U.S. at 310. Could it be assumed that mere transfer of sovereignty from Spain to the United States readied the Moro to put away his bolo, or the Igorot warrior his spear, and to become judges of fact in criminal cases under instructions from a Filipino jurist as to the law, including a full exposition of the presumption of innocence and of the doctrine of reasonable doubt, all duly translated into the appropriate local dialect?

Here, however, we are dealing with American women, raised in the American tradition, who have never lost their civilian status. Can it be said for a moment that their marriage to servicemen, and travel with their husbands to the foreign soil to which the latter were ordered by competent military authority, so far removed them from their heritage that they can now be properly

assimilated to Hawaiians, Filipinos, and Puerto Ricans, to whom the common law jury was wholly foreign?

In the present cases, however, the Government is contending that a court martial can constitutionally be invested with power to try a class of American civilians who, at the time of the adoption of the Constitution, were triable only by a jury. At this juncture it is sufficient to say that this contention is not and cannot be supported by the rationale of *Mankichi*, *Dorr*, or *Balzac* nor by anything in the concept of legislative courts generally. Nothing in any of those cases, we submit, justifies depriving civilian wives of servicemen, women who on the basis of the Court's assumptions are not being dealt with as part of the land and naval forces, of the twice guaranteed constitutional right to a trial by jury.

5. The doctrine of legislative courts does not justify depriving American civilians of the right to bail, which is a necessary consequence of subjecting them to military jurisdiction.

Notwithstanding the Eighth Amendment, there is no such thing as bail at military law. "Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case." Dig. Op. JAG, 1912, p. 481, ¶ 10. "Bail" is in consequence not even indexed in Winthrop.

Yet the guarantee of bail has been deemed so fundamental that it was specifically included in the organic laws that were prescribed for those Spanish-speaking possessions to which the guarantee of jury trial was not extended. Section 5 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 692, 693 (Philippines); Sec. 3 of the Act of August 29, 1916, c. 416, 39 Stat. 545, 546 (same); Sec. 2 of the Act of March 2, 1917, c. 145, 39 Stat. 951, 951-952 (Porto Rico). And the Constitution of the Commonwealth of Puerto Rico that Congress approved in 1952 (Jt. Res. of July 3, 1952, c. 567, 66 Stat. 327) has a very broad bail guarantee in its Bill of Rights, Art. II, § 11.

Last June the Court relied on the non jury cases from the Philippines and Puerto Rico to justify the trial of these women by court-martial without a jury (351 U.S. at 475, 479). But those cases obviously did not and could not justify the denial in the possessions named of the protection against double jeopardy (*Kepner* v. *United States*, 195 U.S. 100; *Grafton* v. *United States*, 206 U.S. 333; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264-266), or of that against cruel and unusual punishments (*Weems* v. *United States*, 217 U.S. 349). Similarly, as has been shown, while jury trial was not guaranteed or even provided for, bail was, from which it necessarily follows, we think, that bail could not have been denied to persons accused of crime in the Philippines or in Puerto Rico.

We have already cited (Covert Br. 82-83) a number of cases that held constitutional guarantees operative in unincorporated territories. To those should be added the decisions that held applicable in Guam the grand jury requirements of the Fifth Amendment. *Pugh* v. *United States*, 212 F. 2d 761 (C.A. 9); *Hatchett* v. *Government of Guam*, 212 F. 2d 767 (C.A. 9), appeal dismissed by stipulation, 348 U.S. 801; *Putty* v. *United States*, 220 F. 2d 473 (C.A. 9), certiorari denied, 350 U.S. 821; *Pennington* v. *Government of Guam*, 228 F. 2d 892 (C.A. 9). Those cases certainly establish the scope of the personal rights guaranteed by the Constitution.

Similarly, the regulations under which the former consular courts operated in China, Japan, and the former Ottoman Empire included provisions for bail before trial and even pending appeal. See *Judicial Extraterritorial Rights*, Sen. Misc. Doc. 89, 47th Cong., 1st sess., pp. 73-74 (§§ 64-70), 97-98 (Forms 65-67), 108 (§§ 68-74), 127-128 (Forms 54-56), 177 (§§ 15-18). Even the *Ross* case, therefore, does not sustain the application to a civilian of the military law to which bail is unknown.

How then can the denial of bail to the civilians who fall within the terms of Art. 2(11), UCMJ, be justified? None of the authorities cited by the Court last June reach that problem. And we submit that no decision of this Court can be found to sustain such an obvious deprivation of a constitutional right heretofore thought available to all civilians.

Indeed, it is both fair and accurate to say that the absence of any provision for bail in the military system emphasizes in striking fashion the utter constitutional impropriety of permitting that system to exercise any jurisdiction over civilians in time of peace.

D. No Other Power or Combination of Powers Conferred by the Constitution Supports the Asserted Jurisdiction.

In the preceding subdivisions of the present Point II, we have shown that constitutional power to try civilian women by court-martial can be found neither in the power to govern the armed forces, with or without the Necessary and Proper Clause; nor in the now abolished consular jurisdiction; nor in whatever consequences may flow from the process of creating legislative courts. Under the present subdivision we lump, by way of catch-all, such other powers conferred by the Constitution to which reference has been or may be made.

1. The war power is both irrelevant and unavailing in the present cases.

We have already pointed out (Covert Br. 69-76) that while the war power sustains the right to try civilians by military tribunals in occupied territory, it is irrelevant to the present trials, which did not take place in areas under American military occupation. We have further pointed out (Krueger Br. 12-16) that Mrs. Smith's trial did not occur "in the field" within the meaning of Art. 2(10), UCMJ.

Those discussions, we would have thought, would have rendered unnecessary any further consideration of the war power. But the direction of the Government's contentions at the last Term, which read into the traditional "in the field" jurisdiction an exercise of the war power, suggest that a few clarifying words will not be found unhelpful.

A. The Government relied (U.S. Reid Br. 8, 10, 28, 40, 45, 46; U.S. Reply Br. 25; Ward & Paul transcript, pp. 28, 29) on a dictum in *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, where this Court said, "Our question *does not* involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces," etc. We have ourselves added the italics; the present occasion must surely be unique in that a case is not only cited but strongly relied on to support the very proposition which was therein stated to be not under consideration.

B. The cases cited in the *Duncan* footnote were *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); and *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645. These, as we have shown (Covert Br. 48-49), were war time camp-follower cases; each person was functionally, and therefore "directly" connected with the forces; none was a civilian wife, not so connected (Covert Br. 60-69).

C. The circumstance that the cited cases arose in war time did not, as Government counsel erroneously assumed (U.S. Reply Br. 25; Ward & Paul, p. 29), indicate that they represented an exercise of the war power. Rather, they reflected the circumstance that, at and before the adoption of the Constitution, the concept of "land and naval Forces" was deemed to be broader in time of actual hostilities within the actual theater of operations. Covert Br. 42-52.

D. Government counsel was similarly inaccurate in suggesting (Ward & Paul, p. 29) that the soundness of the cases in the *Duncan* footnote had been conceded. We had thought that our discussions, written (Krueger Br. 12-16) and oral (Ward & Paul, p. 42) alike, indicated precisely the contrary. But to allay any possible doubts we say here that, in our view, the *Jochen* and *Mikell* cases, which involved Army employees at cantonments in the United States, were erroneously determined, inasmuch as those areas were not "in the field", either under the traditional limitations, or within the intention of Congress in reaffirming those limitations in connection with the Uniform Code. Krueger Br. 12-16.

E. But it is not necessary to resort to what might be deemed mere debating points. It is sufficient to point to the two instances that have come before this Court where the Government relied on the war power to support an extension of military jurisdiction over civilians beyond the limits traditional at the time of the adoption of the Constitution. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304. In each instance the attempt to narrow the area of jury trial failed, although at each time in question the Nation was engaged in bitter strife that threatened its very existence, internal the first time, external the second. The war power having proved inadequate on those occasions, it obviously does not support the military trial of civilians in non-occupied territory in time of peace. The war power has accordingly nothing to do with these cases—and could not justify the military jurisdiction if it had.

2. Considerations based on Article IV, Section 3, are similarly irrelevant.

We have already, *supra*, pp. 81-87, shown that courts-martial are not legislative courts, and that, even if they were, that circumstance would not resolve the present ques-

tion. The original legislative courts, see *American Ins. Co. v. Canter*, 1 Pet. 511; were territorial courts, created in the exercise of the power granted Congress by Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." Since both of the present cases involve situations where the United States was on foreign soil with the consent of the foreign sovereign, the power considered in the *Canter* case and in the series of decisions that followed it in the domain of territorial courts is obviously irrelevant here, where the tribunals involved are, plainly, extra-territorial courts.

3. No combination of powers, each one of which is insufficient by itself, can authorize the present trials.

At the last Term, the Government characterized (U.S. Reply Br. 24) our examination of particular clauses of the Constitution with a view to ascertaining the source of the power now asserted as "this attempted splintering of the Constitution."

We had supposed that inasmuch as ours is a Government of enumerated powers (e.g., *M'Culloch v. Maryland*, 4 Wheat. 316, 405), it was entirely proper to look to every clause of the Constitution to see whether anything in that instrument confers the extraordinary and literally unprecedented powers that are sought to be justified in these cases.

We recognize, of course, that an exertion of Congressional power is frequently said, at least *arguendo*, to rest upon more than one clause of the Constitution. E.g., *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103; *Lichter v. United States*, 334 U.S. 742; *Hines v. Davidowitz*, 312 U.S. 52. But we are aware of no instance where a Congressional enactment was sustained under several powers, each one of which by itself was demonstrably inadequate to support the legislation.

Here, as we have shown (pp. 31-63, *supra*), Art. 2(11), UCMJ, cannot be supported as an exercise of the power "To make Rules for the Government and Regulation of the land and naval Forces," for the reason that dependent wives are no part of such forces and that any attempt to do so would contract their right to jury trial as it existed at and before adoption of the Constitution. Here, as we have also shown (pp. 26-29, *supra*), no form of treaty or international agreement could abridge that right. And no other power conferred by the Constitution (*supra*, pp. 97-100) supports the military jurisdiction that was exercised in these cases. How then could the exercise of all of the powers together do so?

It is one thing to refer to several powers, or even to a galaxy of powers in the aggregate, to justify a result by way of argument; it is quite another to assemble several powers together, each one of which is plainly insufficient by itself and to find a sufficiency in what has been collected.

Even in constitutional law, the whole cannot be greater than the sum of its parts.

E. The Court-Martial Jurisdiction Exercised in the Present Cases Cannot Be Sustained Apart From the Power to Govern the Armed Forces.

Mrs. Covert and Mrs. Smith, the two civilian women whose fate is still in issue here, were tried by *court-martial*, pursuant to Article 2(11) of the Uniform Code of *Military* Justice, and had their convictions successively reviewed by Boards of Review in the Offices of the *Judge Advocate General* of the *Air Force* and of the *Army*, respectively, and then by the Court of *Military* Appeals. The latter tribunal held, after the present cases had been argued here but before the decision last June, that "Article 2(11) of the Code is a valid exercise of Congressional power granted by the Constitution 'to make rules for the government and regulation of the land and naval forces'." *United*

States v. *St. Clair*, 7 USCMA 82, 83, 21 CMR 208, 209, decided May 25, 1956.* But this Court declared (351 U.S. at 476) that there is no need to examine the power of Congress under that clause of the Constitution.

This circumstance may indicate, as one of the non-concurring Justices commented (351 U.S. at 481), "that the Court is not prepared to support the constitutional basis upon which the Covert and Smith courts-martial were instituted and the convictions were secured." But what may well be a more compelling consideration at this juncture is that unless the power to govern the armed forces is examined in these cases—and, in its application to these dependent wives, sustained—no other power supplies the necessary constitutional basis for their prosecution.

1. Absent the Clause 14 power, no law made criminal the acts for which these women were tried, a feature that plainly differentiates the Ross case.

United States v. *Wiltberger*, 5 Wheat. 76, teaches that, in order successfully to prosecute an American citizen for an act committed within foreign territory, some Act of Congress must render that act criminal. Since the legislation in force at the time Wiltberger was apprehended did not punish manslaughter committed on an American vessel moored to a foreign shore, he went free.

In the *Ross* case, 140 U.S. 453, the petitioner was tried by an American consul for a murder committed on an American vessel in Yokohama harbor, within Japanese waters. Section 5339 of the Revised Statutes[28] made murder punishable by the United States "when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular

* Reaffirmed in *United States* v. *Rubenstein*, USCMA No. 7228, Jan. 25, 1957.

[28] In the Criminal Code, R.S. § 5339 was distributed among three sections, §§ 272, 273, and 275. In the 1948 revision, those three sections were combined into two, the present 18 U.S.C. §§ 7 and 1111.

state, on board any vessel belonging in whole or in part to the United States." Ross plainly fell within that provision, under which he could also have been tried in a United States District Court in the first judicial district in which he was found or to which he was brought. R. S. § 730; later Judicial Code, § 41; now 18 U.S.C. § 3238. See *United States* v. *Flores*, 289 U.S. 137; cf. *United States* v. *Rodgers*, 150 U.S. 249.

The only issue in the *Ross* case was whether Ross had been properly tried by a consular court. The United States, in diplomatic exchanges (see 140 U.S. at 473-474), had successfully maintained its right to try Ross notwithstanding he was a British subject. And, apart from what country had the power to try him, apart from what court of this country might properly do so, one point was plain: Ross had violated the Act of Congress that made punishable murder committed on any American ship within the admiralty jurisdiction of the United States.

The correctness of the foregoing analysis is confirmed by what the Solicitor General argued in support of Ross's conviction (Brief for the U.S., No. 1683, Oct. T. 1890, pp. 19, 20):

> "The law which he violated was the law made by the United States for the government of United States vessels; * * *
>
> "This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme."

Thereafter it was well settled that, in order to support a conviction in an extraterritorial court, some Act of Congress must be shown to have been violated (*Biddle* v. *United States*, 156 Fed. 759 (C.A. 9)), although, assuredly, the search frequently turned up some Act of purely local application. See Note, *The United States Court for China*, 49 Harv. L. Rev. 793.

So we turn to see what enactment made criminal what the two women here concerned were accused of doing.

In the present cases, the Act of Congress alleged to have been violated was Art. 118, UCMJ, then 50 U. S. C. § 712:

"Art. 118. Murder.

"*Any person subject to this code* who, without justification or excuse, unlawfully kills a human being, when he—

"(1) has a premeditated design to kill; or

"(2) intends to kill or inflict great bodily harm; or

"(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

"(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct."[29]

We have italicized "Any person subject to this code," because those words underscore the dilemma that results when inquiry into the power of Congress to govern the armed forces is avoided: If Art. 2(11) is a valid exercise of that power, then dependent wives are subject to the Uniform Code of Military Justice, and murder committed by them is duly denounced and made punishable by Art. 118. But if the question of the Clause 14 power is not answered, then it is begging the question to say that they have violated a provision which is only applicable to those who are subject to the Code of Military Justice by virtue of Clause 14 of Art. I, Sec. 8.

In this connection, it is highly significant that the punitive articles of the Uniform Code are most explicit in

[29] Since Jan. 3, 1957, this is 10 U.S.C. § 918, with changes in language presently immaterial.

setting forth the just who is affected thereby. Thus, Art. 113,[30] Misbehavior of sentinel, is applicable only to "Any sentinel or look out." Certain other punitive articles—Arts. 85, 86, 88, 91, 99, 133—apply only to members or particular members of the armed forces. Three punitive articles—Art. 83, Fraudulent enlistment, etc.; Art. 104, Aiding the enemy; and Art. 106 Spies—apply in terms to "Any person". Art. 47 (old 50 U.S.C. § 622; new 10 U.S.C. § 847), Refusal to appear or testify, applies to "Every person not subject to this code," and makes such refusal a civil offense punishable in United States district courts and in specified territorial tribunals. Art. 48 (old 50 U.S.C. § 623; new 10 U.S.C. § 848), Contempts, applies in terms to "Any person." Every other punitive article reads as does Art. 118, here involved, viz., "Any person subject to this code."

Similarly, the Articles of War carefully distinguished between "Any person subject to military law" and "Any person"; the only Articles of 1916-1948 reaching the broader class were AW 32, Contempts; AW 82, Spies; and AW 81, Relieving, Corresponding With or Aiding the Enemy ("Whosoever").

Consequently, it is not sufficient in these cases to show that the two civilian women here concerned killed their husbands. It is a prerequisite to charging them with violation of an Act of Congress to establish that they were, as a matter of law, subject to the Uniform Code. And the latter showing cannot be made without considering the scope and reach of Clause 14.

Otherwise stated, unless one comes squarely to grips with the extent of the power "To make Rules for the Government and Regulation of the land and naval Forces," no

[30] At this juncture, it seems more convenient to give the U.S.C. citations to the punitive articles, Part X of the UCMJ, *en bloc*. They were formerly 50 U.S.C. §§ 671-728, and are now 10 U.S.C. §§ 877-934. The number of the UCMJ Article is a part of the boldface section heading in both U.S.C. versions.

Act of Congress has been shown to be applicable to these two women, who then, unlike Ross, cannot be charged with any violation of a Congressional enactment. (We assume that there will be no need to reargue the proposition that the United States can exercise no common law jurisdiction in criminal cases. *United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Coolidge*, 1 Wheat. 415.)

2. Only Clause 14 supports the broad delegation to the President to regulate the procedure of courts-martial, to prescribe rules of evidence, to define offenses, and to determine the elements of criminality at military law.

The military opinions in the present cases, in the several Boards of Review as well as in the Court of Military Appeals (No. 701, R. 42-121; No. 713, R. 23-94), plainly show that the only contested issue at each trial was whether the respective mental states of Mrs. Covert and Mrs. Smith negatived their legal responsibility.

On that issue, medical and legal opinions in both cases were in sharp conflict, not only with each other but also among each other. The question was finally resolved, in each case, by a sharply divided bench in the Court of Military Appeals—and there the issue turned, in part on Chap. XXIV of the 1951 *Manual for Courts-Martial*, prescribed by the President, and in part on the terms of an identical document promulgated "By order of the Secretaries of the Army and Air Force", entitled *Psychiatry in Military Law*, and denominated Air Force Manual 160-42 in the Air Force and Technical Manual 8-240 in the Army.

Mrs. Smith's conviction was affirmed, while that of Mrs. Covert was reversed. In both cases, the Court of Military Appeals applied the tests and standards for sanity versus insanity that the President and the heads of the two military departments had laid down; and that Court's opinions in the two cases (No. 701, R. 97-121; No. 713, R. 52-94) show that the outcome in each turned on the precise terms of the two manuals just cited.

What is there in the Constitution that endows the President and two heads of military departments with such untrammelled power over the liberty and future of two civilian women?

In this connection, it is important to note that, within the framework of the Uniform Code, the President has well-nigh plenary power over both the substantive and the adjective law applied by courts martial and their appellate agencies. Art. 36(a), U.C.M.J., then in force as 50 U.S.C. § 611(a), provided:

> "36(a) The procedure, including modes of proof, in cases before courts martial * * * may be prescribed by the President by regulations which shall, *so far as he deems practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code."[31]

We have added the italics to indicate the breadth of the power.

To the extent that an accused before a court martial is in uniform and a member of the land and naval forces, this uncanalized delegation is not troublesome. For Article II, Section 2, makes the President the Commander-in-Chief of the Army and Navy, and in military matters he may, at least in general, act through the heads of military departments. 7 Op. Atty. Gen. 453; but see *Waring* v. *United States*, 127 C. Cls. 336, 363-365; *Seltzer* v. *United States*, 98 C. Cls. 554, 561-562; *Weller* v. *United States*, 41 C. Cls. 324, 335-336; *Truitt* v. *United States*, 38 C. Cls. 398. And, as this Court has held, the President's inherent power as Commander-in-Chief enables him to appoint a court-martial for the trial of military personnel even in the absence of a statute specifically conferring that power upon him. *Swaim* v. *United States*, 165 U.S. 553, 555-558.

[31] Now, with some verbal changes, 10 U.S.C. § 836(a).

As the Court of Claims said below in the same case (28 C. Cls. 173, 221-222):

> "The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of the military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress, by the simple expedient of exclusively granting power to appoint courts-martial and approve sentences to a few officers of the Army and tacitly ignoring the President, could practically defeat the express declaration of the Constitution, and strip the office of commander in chief of all real power of command."

But the foregoing doctrine is applicable only to the armed forces, of which the President is the constitutional Commander-in-Chief, and which he commands within the framework of the rules that Congress has made for their government and regulation. In the present cases, however, it is said that there is no need to inquire whether the Clause 14 power reaches civilian wives. But if that power does not have so broad a scope, how then can the President's power as Commander-in-Chief reach civilian wives either?

Plainly "land and naval Forces" in Clause 14, Sec. 8, Art. I, is coextensive with "the Army and Navy of the United States" in Sec. 2, Art. II.[32] If Congress has power to make rules for the government and regulation of the forces, then the President has power to command them. But if the question of Congressional power is put to one side, how can it follow that the President is still Commander-in-Chief, with power to bring to trial, for offenses which he has defined and pursuant to rules of procedure and of evidence which he has prescribed, and with power

[32] The powers of the President and the Congress over the Militia are not relevant in the present connection.

to punish, within limits which he can fix and from time to time vary? Art. 36, UCMJ [formerly 50 U.S.C. § 637, now 10 U.S.C. § 856]; MCM, 1951, chap. XXV; and e.g., Ex. Order 10565, Sept. 28, 1954, 19 Fed. Reg. 6298, 6299; Ex. Order 10652, Jan. 10, 1956, 21 Fed. Reg. 235.

The short of the matter is that the entire system of military justice depends for its functioning on the powers vested in and exercisable by the President as Commander-in-Chief of the armed forces. Without action by the President, there would be no rules of procedure, no rules of evidence, no definition of military offenses, and no maximum punishments. The decisions of the Court of Military Appeals construing various provisions of the *Manual for Courts-Martial* show how much of military jurisprudence rests squarely upon what the President has set forth in that volume; take that book away, and only an essentially unworkable skeleton would be left.

If a given individual is a member of those forces, no substantial problem arises in consequence of the President's headship of the system. But once inquiry into the scope of Congressional power to govern the land and naval forces is put to one side, then the system itself must topple, because the President's essential part therein can only be sustained on the basis of his power and responsibilities as Commander-in-Chief.

If dependent wives are properly a "part" of the land and naval forces (*Toth* v. *Quarles*, 350 U.S. at 15), then the President is *their* Commander-in-Chief as well. But if it be assumed that they are not, or that the question whether they are need not be answered, then the President has no command powers over them. And unless he has such powers, the unfettered delegation to him, without any standards for guidance, of the power to determine by what rules the criminal responsibility of civilian citizens is to be measured, must necessarily fall as completely invalid. The Constitution confers upon the President no

such power to legislate for the conduct of persons whom he does not command as the Commander-in-Chief of the armed forces.

3. If Congress can subject these women to trial by court-martial in time of peace, it is not bound to extend to them the present statutory safeguards.

Last June, the Court said that the Uniform Code of Military Justice (351 U.S. at 474) "was carefully drawn by Congress to include the fundamental guarantees of due process, and in operation it has provided a fair and enlightened system of justice." And, further (351 U.S. at 478, 479) that the Code "would afford more safeguards to an accused than any other available procedure. * * * In addition to the fundamentals of due process, it includes protections which this Court has not required a State to provide and some procedures which would compare favorably with the most advanced criminal codes."

There is no suggestion that the result would have been different had some or all of these safeguards not been provided, and we think it follows from the conclusion reached last Term that if Congress has power to cause civilian wives to be tried by court-martial, it is not bound to establish any particular system of military justice for the conduct of such trials. If Congress can subject dependents to the Uniform Code of Military Justice, it can subject them to Articles of War, in the form in which those Articles were formerly cast.

Thus, traditionally, proceedings of courts-martial could be returned to the court by the reviewing authority for revision, with a view to reconsidering an acquittal or to increasing the severity of a sentence. 6 Op. Atty. Gen. 200; 7 Op. Atty. Gen. 338; Winthrop, *694-*702 (reprint, pp. 454-459); Dig. Op. JAG, 1912, p. 170, ¶ CIIF; *id.*, pp. 568-569, ¶ XIV H2. And that process had the approval of this Court.

In *Ex parte Reed*, 100 U.S. 13, after a navy court-martial had sentenced the accused, the convening authority returned the proceedings for revision of the sentence. A new sentence was adjudged, which (100 U.S. at 20) "was different from the preceding one in two particulars, and in both it was more severe." This Court upheld the legality of the proceedings (pp. 21, 22).

Similarly, in *Swaim v. United States*, 165 U.S. 553, the proceedings were twice returned to an army court-martial for revision, each time resulting in a more severe sentence. The President, who was the convening authority in that case, accompanied his communication to the court-martial with the opinion of the Attorney General on the case, remarking that that opinion had his concurrence, 165 U.S. at 563. The Attorney General had covered the merits, and had strongly indicated that in his view General Swaim should have been sentenced to dismissal: "It should not be necessary to prove that an individual is a moral monstrosity in order to demonstrate his unfitness to be a trusted officer of the army." See 28 C. Cls. 173, 195, 198; 18 Op. Atty. Gen. 113, 117. Yet this Court had no difficulty in sustaining the proceedings.

It is not necessary, however, to go back even into the late Nineteenth Century to demonstrate the legal severities inherent in a military code. The Articles of War of 1916, which first subjected accompanying dependents overseas to military law (*supra*, pp. 40-41, 55; Covert Br. 52-55) exemplified in their operation features that were entirely lawful but excessively severe and summary.

(a) The practice of convening authorities returning cases to courts-martial for the reconsideration of acquittals and of sentences not deemed sufficiently severe, just considered, was general throughout the first World War. See *Trials by Courts-Martial*, Hearings before the Senate Committee on Military Affairs on S. 5320, 65th Cong., 2d sess., pp. 34-35, 246-266; *Establishment of Military Justice*,

Hearings before the Senate Committee on Military Affairs on S. 64, 66th Cong., 1st Sess., pp. 1379-1380. Not until criticism became articulate after the Armistice (e.g., Bruce, *Double Jeopardy and the Power of Review in Court Martial Proceedings*, 3 Minn. L. Rev. 484; Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L. J. 52, 61-63) did the War Department prohibit the practice. GO 88, WD, July 14, 1919, effective August 10, 1919.[33] In the following year, by AW 40 of 1920, the prohibition was made statutory.

But any subsequent Congress would have the power to return to the older system. It is significant that the Fifth Amendment was not mentioned in the *Swaim* case, although a similar course of obtaining a more severe sentence in a civilian criminal prosecution would have run afoul of prohibitions against double jeopardy. *Kepner v. United States*, 195 U.S. 100.

(b) Nor is it necessary for Congress to provide appellate review in court-martial cases, as the instance of the 1917 Houston riot demonstrates.

There, Sgt. William C. Nesbit of Company I, 24th Infantry, as well as 62 other accused, were jointly tried for willful disobedience, mutiny, murder, and assault with intent to murder. The trial lasted over three weeks and the record extended to nearly 2,200 pages. *Establishment of Military Justice*, *supra*, pp. 1125-1126. At the conclusion of the trial, 13 of the accused were sentenced to death by hanging. Those death sentences were all approved by the convening authority on December 10, 1917, and on December 11, the following day, they were carried out. GCMO No. 1299, Hq. Southern Department, Fort Sam Houston, Texas, Dec. 10, 1917. The only "review" made prior to the execution was that made by the convening

[33] The text of GO 88, so far as here material, appears at p. 28, n. 12, of Respondent's Brief in No. 427, Oct. T. 1948 (*Wade v. Hunter*, 336 U.S. 684).

authority's staff judge advocate, and the first information that the War Department had of the case came from the press. *Establishment of Military Justice*, *supra*, p. 94.[9]

There was, of course, considerable comment (*Establishment of Military Justice*, *supra*, pp. 94-97, 1357-1358; *Trials by Courts-Martial*, *supra*, pp. 39, 41-42, 193-199, 209), and the Department promptly locked the stable door by prohibiting the execution of further death sentences until after The Judge Advocate General had reviewed the record of trial. GO 169, WD, Dec. 29, 1917; text in *Trials by Courts-Martial*, *supra*, at 209. But no one contended, or could contend, that what was done in the Houston riot case had been illegal. For the court had been appointed by a department commander, who in time of war, as this was, could approve and confirm death sentences for murder and mutiny without reference to higher authority and without review by The Judge Advocate General. AW 48 of 1916.

What is there in the Constitution, as interpreted by the Court last June, that prevents Congress from reverting to the summary processes and to the revision procedures of the same military code of 1916 that first subjected civilians to military law in time of peace under its Art.

[9] "The hanging of the thirteen negro troopers for complicity in the Houston riot was unknown to practically all officials of the War Department here until it was announced at Fort Sam Houston. So far as can be learned, the departmental commander carried out the executions as a routine affair, as he is warranted to do in time of war.

"No such wholesale execution in the army has occurred within the memory of the present generation. The last of its kind was the execution of members of the so-called 'St. Patrick's battalion' by Gen. Scott during the Mexican war." Washington *Post*, Dec. 12, 1917, p. 4.

For such comfort as may be derived therefrom, it is proper to note that, thereafter, the record of the Houston riot case was reviewed in the Office of The Judge Advocate General and was found to be legally sufficient. *Establishment of Military Justice*, *supra*, at 1124-1126.

2(d)? It may be argued that, as a practical matter, no Congress would take such a retrograde step, and that the present Congressional temper is reflected in the procedural safeguards of the Uniform Code. But the Department of Defense has been pressing for a revision of the Code that is aimed at strengthening its disciplinary features (S. 2133 and H.R. 6583, 84th Cong., 1st sess.), in consequence of increasing military dissatisfaction with its provisions. See Shine, *Fallacious Attacks Against the Code*, 20 The Judge Advocate J. (July 1955) 1, collecting numerous references. We are advised that somewhat similar bills will be introduced in the 85th Congress.

It is significant that, even under the Code as it now stands, there is still no provision for bail (*supra*, pp. 95-97), that Fourth and Fifth Amendment protections thereunder are markedly narrower than in United States courts, and that there is no right of confrontation. Covert Br. 108-110. These features should not occasion surprise. For it is inevitable that, once indictment by grand jury and trial by petit jury are casually brushed aside as not requiring extended mention (cf. 351 U.S. at 479), other constitutional protections will be similarly diluted, disregarded, and, in the end, disrespected. And it is not yet clear that any constitutional guarantees apply to persons who are subject to military law.

Winthrop thought that the first eight Amendments did not apply to such persons at all. See *241 (reprint p. 165, note 38). The Court of Military Appeals has echoed the traditional view. *United States* v. *Clay*, 1 USCMA 74, 77, 1 CMR 74, 77, quoted at Covert Br. 108. And this Court has up to now refused to accord to military personnel the same right to collateral review for deprivation of fundamental constitutional rights by military agencies that it has regularly granted those convicted by federal and state criminal courts. Compare *Johnson* v. *Zerbst*, 304 U.S. 458, and *Legra* v. *Denno*, 347 U.S. 556, with

Burns v. *Wilson*, 346 U.S. 137, and 346 U.S. 844. If, as was held in the case last cited, mere consideration of an accused's constitutional contentions by the military authorities insulates the matter from further review in a court of the United States, then military deviations from the constitutional norms established by the civil courts can never be corrected. And, only a few months ago during the present Term, another attempt to equate the scope of collateral review in military convictions with that available for scrutiny of civilian convictions was bitterly opposed by the Government, and failed. *Kiroski* v. *United States*, 145 F. Supp. 239 (C. Cls.), certiorari denied, 352 U.S. 954 (No. 533).

In *Board of Education* v. *Barnette*, 319 U.S. 624, 642, note 19, the Court said:

> "The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U.S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."

If Congress can subject dependent wives to military law, it can necessarily, as has just been demonstrated, deprive them of many freedoms. From whence does Congress draw such power, from whence can it draw such power, if not from Clause 14? The opinion last June leaves that question unanswered. But we should be aware, fully aware, of just how many freedoms are lost, and how many more endangered, once civilians are held amenable to trial by court-martial. And it needs to be sharply emphasized that, on the basis of the Court's opinions, no constitutional grant of power for such a wholesale withdrawal of protection has been identified.

4. The military considerations adduced are relevant only to the Clause 14 power.

In the present cases, where the results were reached last June after ostensible rejection of whatever powers the Constitution has conferred upon Congress to govern the armed forces, the Court's opinion none the less makes it obvious that military considerations were necessarily relied upon to uphold the courts-martial that are under review.

Thus it is said (351 U.S. at 476-477) that "we, as a Nation, have found it necessary to the preservation of our security to maintain American forces in some sixty-three countries"; that "the lives of military and civilian personnel alike are geared to the local military organization which provides their living accommodations, medical facilities and transportation from and to the United States"; and that by enacting Art. 2(11) "Congress has provided that all shall be subject to the same system of justice and that *the military commander who bears full responsibility for the care and safety of those civilians attached to his command shall also have authority to regulate their conduct.*" [Italics added.] These, without question are purely military considerations. They are relevant to—but relevant only to—the power "To Make Rules for the Government of the land and naval Forces."

It was said (351 U.S. at 480) that No. 713 "presents no problem of * * * the power of Congress to provide for trial of Americans sojourning, touring, or temporarily residing abroad." But *In re Ross*, 140 U.S. 453, which is the foundation stone on which the military jurisdiction in the present cases was rested in June, involved the trial by an American consular court of a British subject who was temporarily in Japan only while the American ship in whose crew he served was lying at anchor in Yokohama harbor. 140 U.S. at 456-457, 470-475. The difference between the situation of Ross and that of the two women

involved here is that the latter were abroad for a far less temporary stay, the exact length of which was dependent on their respective husbands' tours of military duty, and that their American links were far stronger and deeper than the one that tied Ross to his ship, and, through that ship, to American consular jurisdiction. Again, the governing consideration expressed in the Court's opinion last June is the relationship of these two women to the American armed force of which their husbands were members.

Thus the Court has sustained an obvious Congressional attempt to exercise the power "To make Rules for the Government and Regulation of the land and naval Forces" while disclaiming all inquiry into the extent of that power.

The Government's answer to the foregoing (U.S. Memo. 7-8) seems to be that "The so-called 'military' references cited by petitioners were directed to the propriety of using the established courts-martial system to effectuate this Nation's international agreements concerning the exercise of jurisdiction." There is more to the same effect (U.S. Memo. 2-8), all of it based on the premise that foreign nations, by consenting to an exercise of jurisdiction by the United States through military courts, have somehow invested those courts with power to try individuals not otherwise triable therein.

The fallacies underlying that premise have already been set forth (*supra*, pp. 16-20, 26-31) and need only be summarized here:

First, the consent of the territorial sovereign to an exercise of jurisdiction by the personal sovereign does not automatically make the law of the personal sovereign reach the offense (*United States* v. *Wiltberger*, 5 Wheat. 76), nor does it automatically render the offender triable in a particular court of the personal sovereign (*Toth* v. *Quarles*, 350 U.S. 11).

Second, the power to try a particular person by a particular court must be bottomed on and derived from a

grant of power in the Constitution. Cases cited at pp. 30-31, *supra*.

Third, since nothing in the Constitution empowers a court-martial to try dependent wives in time of peace not in occupied territory, and thus deprive those wives of their right to a jury trial, no treaty or international agreement can do so, for the reason that international arrangements cannot infringe upon constitutional guarantees. Cases cited at pp. 26-29, *supra*.

Again, in its Supplemental Brief, the Government argues at length that military jurisdiction over civilians "is a practical necessity * * * to accomplish the military mission" (U.S. Supp. Br. 21-40), and supports its contentions with statements from overseas military commanders which serve to document that conclusion (*id.*, pp. 97-129).

Thus the military considerations are relevant as showing why it might be desirable to amend Clause 14 to reach civilian wives—but, since the Court appears unwilling so to do violence to Clause 14 in the absence of a constitutional amendment, mention of those considerations only serves—we submit with all deference—to underscore the untenability of last June's opinion.

5. Not until these cases were on appeal were the present trials by court-martial sought to be justified by any power other than that conferred by Clause 14.

We have already pointed out (Covert Br. 92-97; Krueger Br. 17) that the references to and invocation of the treaty power are afterthoughts, which are supported neither by the pleadings in the two cases, nor by the legislative history of Art. 2(11), nor by the uniform practice and holdings of the military authorities, the Court of Military Appeals therein included.

The fact—the hard, brutal, stubborn fact of the matter is that, not until the present cases were brought by the Government to this Court, did it occur to anyone to attempt

to support the trials of civilians by court martial now in question on any constitutional basis other than the one upon which both prosecutions were instituted and both convictions secured, viz., the power to govern the armed forces.

The dilemma that faces the Government is apparent.

The present trials by court-martial cannot be supported as an exercise of the power to govern the armed forces, because historically, conceptually, and constitutionally, dependent wives have never been a part of those forces and cannot be treated as such without doing violence to the only double guarantee in the Constitution—a jury trial.

Yet any effort to avoid inquiry into the power to govern the armed forces impales the prosecution upon, not just a horn, but a veritable bed of spikes; for once that power is put to one side, there is none available under which a "legislative" court can be created, the acts committed have not been made punishable, the procedure followed and the law applied have been legislated by executive officers who lack command powers over the accused, and those individuals lose a whole bundle of solemnly guaranteed individual rights—all without any word from any source to say how or by what constitutional grant such deprivation has been authorized.

In *Toth* v. *Quarles*, 350 U.S. 11, this Court in substance held that it was better that an occasional homicide should go unpunished than that the Constitution should be stretched to reach the offender—even though Toth appeared to be a wanton, cold-blooded participant in an unjustified killing.

These two women, unlike Toth, have not gone unpunished. Mrs. Smith has been confined for over four years, for an act done while she was, at the very least, emotionally unbalanced (Krueger Br. 3-5, 23-24). Mrs. Covert served

more time than Toth's two accomplices (Covert Br. 119-121), for an act done while she was, by the weight of the uninfluenced medical testimony, actually psychotic (*id.*, 116-119). She was with child while on trial; the child was born while she was in prison; and it was taken from her a few months later (R. 3; Covert Br. 119, n. 77).

The Court need therefore have no compunction in freeing these two women. But we submit that the Court should reflect long and seriously before it permits to stand as law the injury done to the Constitution in the bases, the premises, and the reasoning of the opinion hastily announced last June. Damage of that character, so our constitutional history all too clearly establishes, takes decades to repair.

F. Military Trial of Civilians Is Utterly Foreign to the American Tradition.

Last June, this Court for the first time in its—and the Nation's—history sustained the trial of civilian women by courts martial in time of peace and in other than occupied territory.[15] We submit that this result constitutes a sharp and unwarranted break with both American history and American tradition. That tradition is essentially anti-militarist, a heritage from the despotism of the first two Stuarts and of Cromwell.

James I and Charles I issued commissions of martial law, warrants to punish at will; these were declared illegal by the Petition of Right in 1628. See Maitland, *The Constitutional History of England*, 324-325. Cromwell in time replaced the Stuart tyranny with one of his own devising far more rigorous, the division of the realm

[15] *Madsen v. Kinsella*, 343 U.S. 341, was a trial by a military government court composed of civilians, and sitting in occupied territory; it is therefore no precedent here, nor was it cited by the Court.

into eleven districts each under a Major-General.[36] Such were the excesses of this turning over of normal processes to the military that, at the Restoration, all parties and factions were agreed that there must be no standing army.[37]

The drafters of the Declaration of Independence were vividly aware of England's experiences with military rule and military trials during the previous century. It was therefore in the established tradition of the English defenders of law against despotism that among the "long train of abuses and usurpations" with which that instrument charged George III were these:

> "He has kept among us, in times of peace, standing Armies without the consent of our Legislature.
>
> "He has affected to render the Military independent of and superior to the Civil Power.
>
> "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

[36] "Military dictatorship supervened, naked if not wholly unashamed. . . . [Cromwell] now [1655] proceeded to divide England and Wales into eleven districts, over each of which a Major-General was placed, with the command of a troop of horse and a reorganised militia. The Major-Generals were given three functions—police and public order, the collection of special taxes upon acknowledged Royalists, and the strict enforcement of Puritan morality. . . . If in a tremendous crisis Cromwell's sword had saved the cause of Parliament, he must stand before history as a representative of dictatorship and military rule who, with all his qualities as a soldier and statesman, is in lasting discord with the genius of the English race." 2 Churchill, *A History of the English Speaking Peoples*, 309-310, 316.

[37] "But both Crown and Parliament were to be free of the Army. That force, which had grown to forty thousand men, unequalled in fighting quality in the world, was to be dispersed, and nothing like it was on any account to be raised ever again. 'No standing Army,' was to be the common watchword of all parties." 2 Churchill, *A History of the English Speaking Peoples*, 330-331.

"At the Restoration the very name of a standing army had become hateful to the classes which were to be the ruling classes." Maitland, *The Constitutional History of England*, 326.

"For quartering large bodies of armed troops among us: * * *

"For depriving us in many cases, of the benefits of Trial by Jury: * * *"

And the same fierce opposition to a standing Army that united the English people in 1660 appeared in the debates on the Army Clause in the Constitutional Convention, in the ratifying conventions, and in the First Congress. *Supra*, pp. 37, 44.

Indeed, the doctrinaire concepts that were then voiced, which equated the existence of a permanent defense force under the command of a constitutional President with that of an extra-legal levy maintained by a King in defiance of Parliament, long hampered the development of a sound military policy for the United States. See Upton, *The Military Policy of the United States;* Spaulding, *The United States Army in War and Peace;* both *passim*. What is here significant, however, is the scope of the anti-military feeling, the intensity with which those convictions were held, and the real grievances which had given birth to both.

The only manner in which military jurisdiction was ever sought to be extended, after 1789 and prior to 1916, was by way of the military commission. That tribunal, first devised by General Winfield Scott in Mexico as an instrumentality of military government (Winthrop, *1297-*1299 [reprint, pp. 832-833]), a perfectly legal use, was transformed by the not entirely happy genius of Judge Advocate General Holt into a means of trying citizens within the United States during and after the Civil War. Winthrop, *1299-*1302, *1307-*1312 (reprint, pp. 833-834, 838-841). This was the forum before which were successively haled Vallandigham, Milligan, the Lincoln Conspirators—and a host of lesser lights, all as duly recorded in Dig. Op. JAG, 1868, pp. 225-232.

Vallandigham, his petition for habeas corpus denied (*Ex parte Vallandigham*, Fed. Case No. 16816 [C.C.S.D. Ohio]), did not appeal, because he had been taken beyond the Union lines (Fairman, *Mr. Justice Miller and the Supreme Court*, 83-84); and his attempt to seek review of the military proceedings by certiorari failed on procedural grounds (*Ex parte Vallandigham*, 1 Wall. 243).

The Trial of the Lincoln Conspirators, though sought to be legally justified (11 Op. Atty. Gen. 215 [one sentence opinion]; 11 Op. Atty. Gen. 297), was bitterly assailed by competent contemporary critics as utterly illegal and unconstitutional. Beale, ed., *The Diary of Edward Bates* [Atty. Gen. in first Lincoln Administration] (H. R. Doc. 818, 71st Cong., 3d sess., vol. IV), pp. 481, 483, 498-503. No one since has ever even attempted to justify that proceeding. Winthrop cites it a few times to illustrate incidental matters, but his silence as to its substance is deafening.

It could not be otherwise, in view of the next case. For Milligan, pursuing the proper procedural course, obtained from this Court a ringing declaration as to the boundaries of military jurisdiction in the still classic *Ex parte Milligan*, 4 Wall. 2. In the light of that ruling, the illegality of a military trial of civilians, in the District of Columbia, where the civil courts were open and unobstructed, was patent. Thereafter, when it appeared that the legality of military trials of civilians under the Reconstruction Acts of 1867 (Winthrop, *1331-*1335 [reprint, pp. 853-855]) might again come before this Court for decision (*Ex parte McCardle*, 6 Wall. 324; *Ex parte Yerger*, 8 Wall. 85), adjudication was prevented, in one instance by a legislative withdrawal of appellate jurisdiction (*Ex parte McCardle*, 7 Wall. 506), in the other by a release of the petitioner from the challenged custody (2 Warren, *The Supreme Court in United States History* [1935 ed.] 496-497).

After that, passions cooled, and in the 1880 edition of the Dig. Op. JAG there is hardly any trace of those military trials of civilians that had so disfigured the 1868 compilation.

The circumstance that, for half a century after *Ex parte Milligan*, no military person ever sought to extend the triability of civilians by military tribunals beyond the limits then established, is a striking illustration of the persistence of the sturdy Anglo-American tradition of the subordination of the military to the civil power, as well as a tribute to the spirit of legality that Winthrop and successive Judge Advocates General had infused into the thinking of the services. The precedents are fully set out *supra*, pp. 36, 40-42, 47, and at Covert Br. 36-41, and will not be repeated—though it is certainly not inappropriate to remark that, throughout all of the Nineteenth Century, no Government lawyer, civilian or military, ever found in *The Federalist* or in the Necessary and Proper Clause what the Government reads into both today, some 170 years after each was written (U.S. Supp. Br. 69-82).

Not until 1916 was any attempt made to enlarge the limits of military jurisdiction over civilians, viz., the enactment of AW 2(d), and even then no articulated justification therefor was offered by anyone. Whether that extension was constitutional is an issue now raised for the first time.

The only extension in practice was essentially an aberration, the widened scope of "in the field," which is now without legislative support (Krueger Br. 12-16). It is interesting to note that Senator Chamberlain's unilateral attempt to enlarge military jurisdiction by declaring all disaffected persons to be spies (*supra*, pp. 52-53), was based on a similar enlargement of the scope of "in the field." The first section of his bill (S. 4364, 65th Cong., 2d sess.) provided (italics added):

"That owing to changes in the conditions of modern warfare, whereby the enemy now attempts to attack and injure the successful prosecution of the war by the United States, by means of civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, *thus constituting the United States a part of the zone of operations* conducted by the enemy, * * * "

It hardly required President Wilson's statement (*supra*, p. 53) to make it known that such a measure was unconstitutional.

Apart from the few aberrant World War I cases (Krueger Br. 12-16; *supra*, pp. 36, 99), there was no extension of military jurisdiction over civilians in practice until 1941 (Covert Br. 56), and dependent wives seem never to have been subjected to trial by court-martial prior to 1950 (Covert Br. 63).

But World War II, like the Civil War, brought another attempt, by means of tribunals of martial law, to extend the limits of military jurisdiction beyond the limits that were well recognized when the Constitution was adopted.

This attempt also failed (*Duncan* v. *Kahanamoku*, 327 U.S. 304), and the majority of the Court placed the result, not on the narrow ground taken by Stone, C. J., to the effect that the Government failed to show any such necessity as would justify the military trial of a civilian (327 U.S. at 335-337), but on the broad proposition that any such trial (p. 324) would "exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions * * * "

So there is left only the attempt to subject to military law civilians accompanying the forces overseas, which

dates only from 1916, and which is now before this Court as a question of first impression.

If that comparatively recent instrumentality for eroding the right to a jury trial had ever been rested on some articulated constitutional basis, one might perhaps pause before condemning it out of hand; but, as we have shown (*supra*, pp. 54-57, and Covert Br. 52-60), it never was; and moreover Congress was at no time advised that the question even presented a constitutional problem. In consequence, once the notion that the excepting clause of the Fifth Amendment somehow constituted a grant of power was exploded by *Toth* v. *Quarles*, 350 U.S. 11, there was no justification at hand to support Art. 2(11). And the circumstance that the Court last June was unwilling to rest the present trials on the Clause 14 power under which they plainly were undertaken is certainly a significant indication that what on its face would seem to be the obvious justification was actually unavailing.

Once past the idea that dependent wives are triable by court-martial because they can somehow be comprehended within "land and naval Forces", it is plain that a court-martial is not an appropriate instrument for dispensing justice to civilians, essentially because it negatives the very concept of a tribunal qualified to deal with civilians.

Only a very few years ago, the Government was making the same point. Thus, in opposing further review of Mrs. Madsen's case, the Solicitor General said (Br. Op., *Madsen* v. *Kinsella*, No. 82 Misc., Oct. T. 1951, p. 26):

> "We submit that this system [of civilian military government courts] for administering justice among the many American civilians in occupied Germany is more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts."

Unlike the tribunals considered in *Madsen*, which had some permanence, a court-martial is created by the order

of a military commander, who determines who shall be tried by it (MCM, 1951, ¶¶33, 35), and whose approval is requisite to the validity of its sentences (*supra*, pp. 84-85). But the qualities that fit an individual to administer armies in time of peace and to command them during hostilities are demonstrably different from those requisite for men whose primary duty it is to deal with law. As this Court said in *Toth* at 17,

> "* * * conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. * * * Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

In considering whether, in fact, the Uniform Code (351 U.S. at 474) "has provided a fair and enlightened system of justice," or whether the Code can actually (351 U.S. at 479) "compare favorably with the most advanced criminal codes," it is necessary to take into account somewhat more of the present records than is reflected in last June's opinions.

Consider the case of Mrs. Smith: She had been under psychiatric treatment for some five years before the incident now in question, and on the day of the act had been taking barbiturates and paraldehyde. Although the senior medical witness at the trial considered her unable to adhere to the right (in terms of the McNaghten rules), under the provisions of the Army's manual on psychiatry her episodes were merely character and behavior disorders

Two attempts to reopen the issue of sanity, one based on an affidavit from a medical witness that "from a purely medical point of view" his opinion was different from the one to which he had earlier adhered under compulsion of the manual, were rejected by a Board of Review.

The results of further psychiatric examinations, more favorable to Mrs. Smith, but still reflecting a difference between military and civilian psychiatry based on the Army manual, were brushed aside in fairly summary fashion by another Board of Review. The conviction was finally affirmed by the Court of Military Appeals, only one member of which was able to find in the proceedings vitiating unfairness by reason of testimonial compulsion. See Krueger, Br. 36, where the references are fully set forth. So Mrs. Smith is now serving a sentence of life imprisonment.

If it is appropriate to delve into comparative jurisprudence, as this Court seems to have done last June (*supra*, p. 127), it seems proper to ask: In what civilian American jurisdiction, federal, state, or territorial, would a life sentence have been imposed on Mrs. Smith in her circumstances? No dispassionate observer familiar with the operation of American criminal law in action will, we think, venture to point to any.

Or consider the case of Mrs. Covert: By the weight of the uninfluenced medical testimony, and all of the expert witnesses were officers of the Air Force; none was a hired champion—she was actually psychotic at the time of the act. After the trial, two of the prosecution witnesses presented unsolicited affidavits in which they retracted their trial testimony, which had been based on the same manual that had been involved in Mrs. Smith's case; one deposed that in his medical opinion the findings of the court-martial were "completely wrong", the other that those findings were "a clear-cut miscarriage of justice." A third witness, who had appeared for the defense, spelled out in detail

wherein he had considered this distraught woman who after the act had climbed into the cot where the corpse of her husband lay and had spent the night there to have been psychotic. Yet the majority of the Board of Review held that these post trial affidavits did not even raise a reasonable doubt as to her sanity. See Covert Br. 116-119, collecting the record references.

Would Mrs. Covert even have been convicted in any American civilian court? Surely no psychiatric witness in any civilian tribunal would have felt impelled to yield his medical views to the fiat of a manual, as those at her trial by court martial did.

Consider the life sentence imposed on Mrs. Covert. We have already pointed out that, at the time the writ issued below, she had already served more time than had both accomplices of Toth, who were admittedly sane, and who participated in a cold blooded murder. Covert Br. 120-121. Despite those facts, despite the evidence of her mental condition, despite the fact that she was with child at the trial, and that the child was born while she was in prison, there to be taken from her a few months later (Covert Br. 119, n. 77; R. 3, No. 701), the Board of Review concluded (R. 61) that "Anything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted."

In what American civilian jurisdiction would such a sentence have been imposed if there had been a conviction in any degree?

The suggestion earlier made (Covert Br. 120), that the sentence in the *Covert* case reflected vindictiveness, far from being dispelled by anything that has happened since, seems rather to have been thereafter substantiated. The Government opposed Mrs. Covert's motion to stay the mandate pending the disposition of the Petition for Rehearing unless she would consent to subject herself to further psychiatric probing at St. Elizabeth's during the summer.

That is to say, while the Petition for Rehearing was *sub judice*, the Government insisted that she be returned to its custody, where it offered her a choice between confinement in a jail or confinement in an asylum—as though the Air Force's military honor were somehow bound up with retrying her.[38]

Where can there be found an American prosecutor, state or federal, who would press a retrial for a woman whose legal responsibility was so very doubtful, and who had already been so grievously punished, by imprisonment and by separation from her new-born infant?

It is well to recall what the Court said in *Toth*, only at the last Term (350 U.S. at 17): "* * * it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

American history, over seven great wars and a host of smaller ones, demonstrates the competence of our captains and our armed forces in battle. In that field they stand supreme. But in the realm of trying civilians for civilian offenses, they have something less than competence, as can be seen by anyone who reads the rather short printed records in these two cases.

The men who fashioned the Constitution of the United States were not doctrinaire libertarians, nor were they unfamiliar with the practical tasks of war. Of the 55 members of the Convention, 18—including Washington—had been officers of the Continental Army, and 13 more had held commissions in the militia. 6 Freeman, *George Washington*, 93. But they were aware of the functional as well as the traditional reasons for drawing a line between civil and military trials. Hence they wisely limited the jurisdiction of courts-martial to "land and naval Forces," including therein only those functionally connected civilians

[38] On June 18, 1956, however, the mandate was stayed by order of Mr. Justice Clark.

who were actually in the field, i.e., within the theater of actual hostilities in time of actual hostilities; or, otherwise stated, including only that narrow class of civilians who had in fact been subject to the Continental Articles of War.

We think, therefore, that, just as ordinary legislative courts cannot be invested with Article III judicial power because, as Chief Justice Marshall said, "They are incapable of receiving it" (*American Ins. Co. v. Canter*, 1 Pet. 511, 546), so courts martial cannot be invested with jurisdiction to try a class of civilians who in 1789 could claim a jury trial. Courts-martial are incapable of receiving any such jurisdiction, essentially because they "form a system of courts separate from civil courts and created by virtue of an independent grant of power in the Constitution." Brandeis, J., in *Crowell v. Benson*, 285 U.S. 22, 39, note 26.

It is argued at length that "the military needs of the international community" (U.S. Supp. Br. 81), require a different answer, and there are submitted to the Court statements by seven overseas commanders (U.S. Supp. Br. 97-129) that point out why these gentlemen sincerely believe that they must have power to try civilians by court martial, else, so they say, their military mission overseas will fail.

We point out below, pp. 142-153, both the legal and factual deficiencies in these *ex parte* statements, which do not disclose (1) that the reason for having civilian employees overseas in preference to servicemen is purely budgetary; or (2) that the armed forces overseas use the services of more than fifteen times as many foreign civilians as American civilians; or (3) that under NATO and NATO-type agreements primary jurisdiction over all civilian dependents has been conceded to the receiving states. In those circumstances, all of which are fully documented below, the assertions of necessity boil down to considerations of mere expediency.

But even if the argument of necessity had more substance than it is shown to have, it would be unavailing; and it is not new. It was made in this Court just 90 years ago, in *Ex parte Milligan*, 4 Wall. 2, where it was answered in words that still bear repetition (pp. 120-121):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

We submit that the justification of military necessity should be declared as unavailing in 1956 as it was in 1866.

The principle that is at stake in the present cases is whether the protections of the Constitution are to be eroded because of the expediency of the passing hour or of the need for security against foreign foes. Two expressions by former members of the Court seem apposite in the present connection.

On a few years ago, Mr. Justice Jackson wrote (*The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A.J. 961, 963):

> "It seems to me that these traditional freedoms are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value. In this anxiety-ridden time, many are ready to exchange some of their liberties for a real or fancied increase in security against external foes, internal betrayers or criminals. * * * Many will give up individual rights

> for promise of collective advantages. * * * Certainly in the minds of many foreign peoples our type of individual liberty has been out valued by promises of social welfare and economic security, which they want too passionately to be critical of the price. If this indifference to traditional values should spread to us, it would be the greatest threat to our own liberties."

And, some years before that, Justice Cardozo thus expressed the American ideal of constitutionalism in his acknowledged classic, *The Nature of the Judicial Process* (pp. 92-93):

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."

What is so very disturbing about the opinions last June, infinitely more so than the purely legal misconceptions on which they rest, and which have been fully demonstrated above, is the sharp break that they make with our constitutional concepts. For if "we turn to the words of the Constitution read in their historical setting as revealing the purposes of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes". (*United States v. Classic*, 313 U.S. 299, 317-318), then it is plain that the Constitution confers no power to subject to trial by court martial in time of peace civilian women whose only nexus with the land and naval forces is their marriage to servicemen.

Any accurate review of our historical and institutional heritage leads inevitably to the conclusion that the decisions in the present cases at the last Term do violence to the work and the ideals of the Founders, and to the traditions of the Constitution that they fashioned 170 years ago.

III. THE RESULT REACHED LAST JUNE IS COMPLETELY IRRECONCILABLE WITH TOTH v. QUARLES, 350 U.S. 11.

A. Every Consideration Relied on in the Present Cases Would Have Supported Toth's Trial by Court-Martial.

In comparing the present cases with that of Toth, it is essential to bear in mind that, at the time habeas corpus was sought on the latter's behalf, he was in Korea, and the writ issued to return him from Korea to the United States. See *Toth* v. *Talbott*, 113 F. Supp. 330, 331 (D.D.C.); *Toth* v. *Talbott*, 114 F. Supp. 468, 469 (D.D.C.). ("The question before the Court * * * is the legality of the restraint of the petitioner in Korea."); *Talbott* v. *United States*, 215 F. 2d 22, 24-25 (D.C. Cir.).

Therefore, since Toth was in fact in Korea, the methods by which he was brought there are immaterial, since it is of course well settled that a court is not justified in refusing to exercise jurisdiction over an offender merely because he has been brought within its jurisdiction by means which are irregular or even illegal. *Pettibone* v. *Nichols*, 203 U.S. 192; *Mahon* v. *Justice*, 127 U.S. 700; *Ker* v. *Illinois*, 119 U.S. 436. The cited cases are ample to establish that the jurisdiction of the court-martial before which Toth was to be tried could not have been impaired by reason of the circumstance that he had been brought before it by what undoubtedly was a forcible taking.

It is also essential to bear in mind that American troops were in Korea, not as enemies and accordingly exempt from Korean jurisdiction because members of an enemy force (*Coleman* v. *Tennessee*, 97 U.S. 509, 515, 516; *Dow*

v. *Johnson*, 100 U.S. 158, 165 166; *United States v. Plenty Horses*, U.S.D.C., D. So. Dak., cited in Winthrop *1212 (reprint, p. 778); *Arce v. State*, 83 Tex.Cr. 292, 202 S.W. 951), but as friends; and their exemption from Korean jurisdiction was based on the exemption accorded friendly armed forces who enter foreign territory with the consent of the foreign sovereign (*supra*, pp. 71 80).

Thus, Toth, Mrs. Covert, and Mrs. Smith, were all American citizens who were present in foreign countries with the consent of the foreign sovereign. Each was charged with committing a homicide in that foreign country, the only difference being that Toth's victim was a national of that country, while the deceased in the other two instances were American military personnel.

In all three cases, Congress sought to make the offense punishable, provided courts martial to try the offender, and sought to subject the accused to the Uniform Code of Military Justice, Toth by Art. 3(a), and the two women by Art. 2(11).

The rationale of the opinion in the present cases last June was that an American civilian committing an offense while in an American military community in a foreign country may constitutionally be tried by an American court-martial in that foreign country for an offense committed there; that the Constitution does not require trial in a foreign country before a court conforming to Article III for offenses committed there by an American citizen; that Congress may establish legislative courts for that purpose; that if was reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose; that the failure of the Uniform Code to provide for indictment by grand jury or trial by petit jury is not a constitutional defect, since in these respects the Code "does not differ from the procedures specifically approved by this Court in other types of legislative courts established abroad by Congress" (351 U.S. at 479).

That reasoning, we submit, was applicable in every particular to Toth. Yet Toth's trial by court martial was held to be beyond the constitutional power of Congress, even though, at the time he committed his offense, he was a member of the Air Force and in consequence amenable without question to military jurisdiction.

We repeat, the reasoning in the present cases was plainly adapted to reach Toth, who, when his sister filed her petition for habeas corpus to secure his release, was "accompanying the armed forces without the continental limits of the United States." Art. 2(11), UCMJ.

B. Toth's Separation From the Service Prior to the Discovery of His Offense Would Not, Under Established Extradition Doctrines, Have Varied the Result Under the Rationale of Last June's Opinions.

But even on the basis—contrary to the actual facts in his case—that Toth had sought release from custody before he was returned to Korea, i.e., on the footing that he was fighting extradition from the United States back to the jurisdiction that was seeking to try him, the rationale of the opinion in the present cases last June would have been sufficient to hold him.

For the basis of last June's opinion in these cases was that the courts-martial that tried Mrs. Covert and Mrs. Smith were legislative courts validly established. On that footing, there would be no reason to refuse to extradite an American civilian in the United States so as to place him on trial before the American court-martial sitting in the foreign country.

Congress long ago provided for extradition from the States of the Union to legislative courts in the territories (Sec. 1 of the Act of Feb. 12, 1793, c. 7, 1 Stat. 302; later R.S. § 5278; now 18 U.S.C. § 3182), a power that was always exercised without serious constitutional challenge. See *Ex parte Morgan*, 20 Fed. 298, 303-304 (W.D. Ark.);

Ex parte Krause, 228 Fed. 547, 551 (W. D. Wash.); *In re Gillis*, 38 Wash. 156, 80 Pac. 300.

Congress also provided for extradition from the United States into foreign territory occupied by the United States (Act of June 6, 1900, c. 793, 31 Stat. 636; now 18 U.S.C. § 3185), and this was sustained in *Neely v. Henkel*, 180 U.S. 109, where the accused was required to stand trial before an American military commission sitting in occupied Cuba.

Furthermore, military jurisdiction over a civilian employee who escaped to the United States from occupied Germany was sustained in a situation that involved, in substance, a forced extradition. *United States ex rel Mobley v. Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904.

Consequently, if the trial of civilians by court martial is sustainable on the grounds set forth in the Court's opinion in the present cases last June, then Toth was, as a constitutional matter, also amenable to military jurisdiction notwithstanding his return to this country and his reacquired civilian status here.

It makes no difference how the cases are viewed, the result is always the same. In its essentials, in its substance, the holding of *Toth v. Quarles*, 350 U.S. 11, cannot be reconciled with the basis for and the reasoning of the opinions in these cases last June.

IV. AS LONG AS THE OBJECT SOUGHT TO BE ATTAINED IS THE PUNISHMENT OF CRIME RATHER THAN MILITARY CONTROL OF CIVILIANS, PRACTICAL ALTERNATIVES ARE AVAILABLE

In response to the Court's first question as to "The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas" (352 U.S. 901), the Government has presented an

elaborate argument buttressed by communications from interested overseas commanders (U.S. Supp. Br. 21-63, 97-129). It is our position that the question under consideration in the present cases, which concerns the scope of the Bill of Rights, is not one that can be resolved by an examination of practical necessities, that the materials adduced are in any event demonstrably inadequate as a basis for judgment, and that the Government has failed alike to suggest the obvious solution in the case of civilian employees or to disclose the true legal position with respect to the civilian dependents.

A. These Are Not Cases Involving Questions of Substantive Due Process Where "Practical Necessities" Are Relevant to Measure Constitutionality, and the Materials Adduced Are Moreover Not of a Nature That Can Safely Be Relied Upon as a Foundation for Judicial Action.

The basic fallacy underlying the Government's arguments based on the "practical necessities" is the assumption that the use of courts-martial to try civilians overseas is a simple matter of legislative judgment requiring only a showing that the judgment is a reasonable one (U.S. Supp. Br. 3, 4, 40, 82). That assumption mistakes the nature of the problem.

The question here is not one of substantive due process, whether a particular exertion of regulatory power bears a reasonable relation to a legitimate legislative end. Nor is the question presented one of the limits of due process in a national emergency. E.g., *Wilson* v. *New*, 243 U.S. 332; *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398; *Hirabayashi* v. *United States*, 320 U.S. 81; *Korematsu* v. *United States*, 323 U.S. 214. It is rather one of ascertaining the location of the constitutional boundary between trial by jury and trial by court-martial, a field wherein there is simply no scope for legislative judgment. That matter has been placed beyond the competence of the legislature by the Constitution itself.

To argue, as the Government does (U. S. Supp. Br. 29-30), that "The decision whether civilians overseas are a necessary part of our armed forces and whether practical necessity requires that they be subject to military authority is primarily one for the executive and legislative branches of our government," seems to us nothing more than an expression of contempt for the very concept of the Bill of Rights and for the functions of this Court in defining and enforcing its guarantees.

The distinction between the two inquiries is well illustrated by the many cases involving State criminal procedure. It is reasonable, and hence consistent with the Due Process Clause of the Fourteenth Amendment, for a State to substitute information for indictment (*Hurtado* v. *California*, 110 U.S. 516), to provide for a jury of less than 12 in criminal cases (*Maxwell* v. *Dow*, 176 U.S. 581) or to provide for a majority verdict in such cases (*Jordan* v. *Massachusetts*, 225 U.S. 167, 176), to permit the prosecution to comment on the defendant's failure to testify (*Twining* v. *New Jersey*, 211 U.S. 78; *Adamson* v. *California*, 332 U.S. 46), to grant the prosecution an appeal in criminal cases (*Palko* v. *Connecticut*, 302 U.S. 319), to substitute new concepts of double jeopardy (*Brock* v. *North Carolina*, 344 U.S. 424), and to permit the use of illegally obtained evidence (*Wolf* v. *Colorado*, 338 U.S. 25). But the very reasonableness that saves the particular rule of State law when assailed as being violative of Due Process is utterly unavailing when put forward as a reason for permitting similar action under Federal law, for the obvious reason that all action by the United States is subject to the express and specific limitations of the Bill of Rights.

Consequently, when inquiry is made into the legality of Federal action as against Bill of Rights safeguards and guarantees that are in question, resort must be had, not to conceptions of reasonableness in the abstract, but to

historical materials, the rules of the common law, the understanding of the Founders, and the administrative construction over the years. This was the course pursued in *Ex parte Quirin*, 317 U.S. 1, in ascertaining whether the saboteurs were properly tried by a military commission. This was also the course pursued in *District of Columbia* v. *Colts*, 282 U.S. 63, and in *District of Columbia* v. *Clawans*, 300 U.S. 617, in determining what kinds of offenses were petty in the constitutional sense so as to be triable without a jury. This was similarly the direction and nature of the inquiry in *United States* v. *Wood*, 299 U.S. 123, where it was held that Government employees were proper jurors in a criminal trial. Indeed, it was on the basis of the historical materials adduced by the Government in that case (No. 34, Oct. T. 1936) that the Court disapproved its earlier contrary holding in *Crawford* v. *United States*, 212 U.S. 183.

Plainly, the latter question could not be resolved by asking the United States Attorney for the District of Columbia whether the "practical necessities" of law enforcement in that jurisdiction required the use of Government employees as jurors. The determining factor in the *Wood* case was that, as the Government's researches into the precedents from the days of black letter folios in Law French showed, King's servants were not *per se* ineligible to be jurors as a matter of common law.

Nor can the issues now involved be decided by assertions, variously phrased (U.S. Supp. Br. 6, 22-33), that the overseas military commander's powers and authority must be commensurate with his responsibilities. For if his responsibilities, which plainly stem from international agreements, are greater than the powers he is granted or can exercise under the Constitution, this kind of argument resolves itself into the inadmissible contention (*supra*, pp. 26-29) that a treaty or other agreement can override specific constitutional guarantees.

But even if these cases were deemed, for purposes of argument, appropriate for resort to extra-judicial sources, it is plain that the materials presented do not measure up to the standard of trustworthiness that has attached to those which the Court has considered in the past.

Unlike the kind of reports that Mr. Louis D. Brandeis brought to the attention of the Court through his famous brief in *Muller* v. *Oregon*, 208 U.S. 412, 419-420, reports which could qualify as "matters of general knowledge" and so come within the realm of judicial notice, the letters exhibited in these cases represent simply expressions by those whose powers are involved. And whereas foreign legislation such as that considered in the *Muller* case was plainly relevant to the issue of reasonableness, foreign military legislation from countries not having our constitutional limitations is, as has been held, unavailing here. *Toth* v. *Quarles*, 350 U.S. 11 (see the foreign statutes cited at 29-31, note 11); *United States* v. *Cooke*, 336 U.S. 210 (see the British statutes cited at Resp. Br. 13, n. 4, No. 231, Oct. T. 1948).

But the letters brought forward in the present case are subject to other infirmities also. They are *ex parte*, and, as will be pointed out below in detail, they bristle with points that are left in doubt or else not covered at all, points on which cross-examination would have elicited pertinent information. In the last case before this Court where it was sought to establish military necessity as a justification (*Duncan* v. *Kahanamoku*, 327 U.S. 304), the Government did not resort to letters in its appellate briefs, but instead produced its military witnesses at the habeas corpus hearing in the District Court, where they were of course subject to cross-examination (No. 14, Oct. T. 1945, R. 1066-1078; No. 15, *id.*, R. 55-56, 241-301).

Moreover, the letters now pressed on the Court as determinative of the contested issue are, all too obviously, *post motam litem*; their approach is keynoted by the first

sentence of the first letter printed (U.S. Supp. Br. 28): "The news that the United States Supreme Court has agreed to reconsider the question of the amenability to military law of dependents accompanying military personnel overseas is most disturbing." No doubt similar communications could be obtained from lawyers, constitutional scholars, and, for that matter, from dependent wives overseas, to the effect that last June's decisions were even more disturbing. But we hardly think that such a course of counter-picketing the inside of the courthouse—outside picketing having already been banned by 18 U.S.C. § 1507 and 40 U.S.C. §§ 13f-13p—would be in any degree helpful.

The short of the matter is that the materials now brought forward are not adapted for use as a basis on which to found judgment. And in no case of which we are aware, including those where, unlike the present ones, the extrajudicial materials have been relevant to the issues under consideration, has the Court rested its decision on the obviously self-serving statements of the very officers whose powers were being challenged.

B. If, as the Government Contends, There is an Impelling Military Reason Why Overseas Commanders Must Command, Control, and Punish Civilian Employees, Then the Obvious Solution, Which is Plainly Constitutional and Which Has Not Been Shown to be Impractical, is to Employ Only Military Personnel for Overseas Military Duties.

The Government argues at length the need for overseas commanders to control civilian employees, and to try by court martial any who offend; and stress is laid on the circumstance that it is unfair to try a soldier by one law and the civilian working next to him by another. (U.S. Supp. Br. 29-30, 35).

But the arguments made and the letters from overseas commanders that are produced are alike silent on what plainly are controlling factors:

First, What military reason is there why civilians must be employed in military work overseas?

Second, What military reason prevents overseas duty assignments from being reserved for military personnel, whose discipline raises no constitutional question?

We will show, from authoritative sources, that the compelling reason for the present proliferation of civilians within military installations, both at home and abroad, is not in any sense military, but is purely budgetary. We will similarly show that the supposed disciplinary considerations that are put forward in respect of security considerations and military orders, violation of which does not constitute any offense against either foreign law or against the general American criminal law, break down in view of the more than 250,000 non-American civilians currently employed by the Department of Defense abroad. Finally, we show that the Government's data fail to establish even the impracticability of obtaining military personnel to perform the tasks now carried on by civilians.

First. It is a demonstrable fact, though assuredly it cannot be inferred from any of the *ex parte* materials now adduced by the Government, that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary.

In 1954, the House Committee on Appropriations told the Army (H. R. Rep. 1545, 83d Cong., 2d sess., p. 16), that "one obvious alternative to military manpower is the use of more civilians whose annual cost is considerably less, on the average, than that of the man in uniform."

Sec. 720 of the Defense Appropriation Act of that year (Act of June 30, 1954, c. 432, 68 Stat. 337, 358), therefore authorized the substitution of civilian for military personnel "whenever, in the opinion of the Secretary of the Military Department concerned, the direct substitution of civilian personnel for an equivalent or greater number of

military personnel will result in economy without adverse effect upon national defense * * *."

Accordingly, the Army undertook the process of substituting 11,888 civilians for 12,495 military personnel under the title "Operation Teammate." See *Department of the Army Appropriations for 1956*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st sess., pp. 4, 74, 296-297, 459-463, 1124-1126. As expressed by Brig. Gen. Westmoreland of the Personnel Division of the Army's General Staff (*id.*, pp. 459, 1125):

> "In general terms, this policy provides for the maximum use of civilian personnel in all positions which do not require military skills or military incumbents for reasons of training, security, or discipline.
>
> * * * * *
>
> "What we are doing is changing the composition of our military-civilian work force by increasing the percentage of civilians."

An official comment on Operation Teammate (*Army Information Digest*, Vol. 10, No. 4 (April 1955), p. 47) was that "The program will permit the Army to retain in service a number of combat units which otherwise would have been inactivated due to reduced personnel ceilings."

In the following year, Congress was advised of the savings effected by Operation Teammate. *Department of the Army Appropriations for 1957*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 2d sess., pp. 156, 316 *et seq.*, and see particularly the chart at 318 showing actual savings.

2. In this connection, it is an historical fact that "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction work in combat

areas." 1 *Building the Navy's Bases in World War II. History of the Bureau of Yards and Docks and the Civil Engineer Corps, 1940-1946* (1947) 133. It was found that, when war came, contractors' employees who were civilians not only lacked the training necessary to defend themselves, but could not consistently with international law bear arms against the enemy. *Id.*

3. If, therefore, civilian employees cannot be tried by court-martial and thus subjected to military control in the degree thought necessary by the overseas commanders, it is plain that these employees' positions do require "military incumbents for reasons of * * * discipline" (Gen Westmoreland, *supra*, p. 144), and that civilians cannot be substituted for such military incumbents "without adverse effect upon national defense" (Sec. 720 of the Act of June 30, 1954, *supra*, pp. 143-144).

Second. The Government argues at length (U.S. Supp. Br. 57-61) that "As to offenses which are not crimes under the law of the foreign state, but are crimes only under American military law, the alternative to court martial jurisdiction is no trial at all." But that argument is marked by two significant omissions.

1. The Government does not disclose what is the fact, that the Department of Defense presently employs 76,514 non-American civilians in foreign countries, and that it contracts with foreign governments for the services of 275,640 additional non-American civilians, who remain employees of those governments, which in turn receive reimbursement for such services from the United States. See U.S. Civil Service Commission, *Federal Employment Statistics Bulletin*, October 1956, p. 9; see also 103 Cong. Rec. 617 (daily ed., Jan. 17, 1957).

Thus over 350,000 non-American civilians are permitted to overrun our foreign military installations, individuals who can by no stretch of law or imagination be subjected to trial by an American court-martial.

The Government nowhere explains why security and discipline will break down for want of power to court martial the 23,000 American civilians whose misdeeds do not involve a violation of foreign law, while at the same time both are secure against the propensities and proclivities of 350,000 foreigners.

2. Nor does the Government explain why every military commander in the United States is not similarly faced with the problem of civilian employees on his installation whose acts (U.S. Supp. Br. 59) "are not now offenses under the general criminal laws of the United States." Here again, we submit, the attempt to assert the overseas civilians into a military status fails on still another score.

Third: What is said by the Government as to the type of occupations performed by civilians with the Army overseas is so incomplete that it affords no real understanding of the problem.

Thus, it is said that the armed forces require the services of civilian technicians (U.S. Supp. Br. 24, 37, 40) and that some 23,000 American citizen-employees are now in foreign countries (*id.* 23), and it is said (*id.* 37) that "civilian technicians are an integral part of a larger ship's complement."

No breakdown as to the occupation of the 23,000 civilian employees is vouchsafed, and nothing is offered to show whether the majority of these individuals are highly skilled technicians—or are merely clerks, stenographers, mechanics, and post-exchange stewards.

We know that a number of the civilians tried by court martial overseas have been mere merchant seamen. E.g., *United States* v. *Garcia*, 5 USCMA 88, 17 CMR 88; *United States* v. *Robertson*, 5 USCMA 806, 19 CMR 102. One such accused was a civilian manager of "The Landing Strip Civilian Club." See *United States* v. *Rubenstein*, 19 CMR 709, 729, affirmed, USCMA, Jan. 25, 1957; *Ruben-*

stein v. *Wilson*, 212 F. 2d 631, 632 (D. C. Cir.). And it appears from the records of the Iceland command (U.S. Supp. Br. 130-131) that many of the civilians there subjected to military trials have been contractors' employees and thus not employees of the Government at all.

With respect to the composition of the civilian work force, we cannot point to any published documents, but we have made inquiries of individuals who have knowledge of the facts. It is accordingly our information, first, that by far the bulk of the 23,000 civilian employees in question occupy essentially clerical or minor managerial positions, most of them in the lower civil service grades, and that only a very small percentage are technicians in the upper grades who are skilled in essential specialities; and, second, that no Navy ship has any civilians as an integral part of its complement, and that the only civilians who ever sail on such vessels are employees of the concerns installing technical equipment who are on board for only a few voyages to train naval personnel in the use of such equipment.

In any event, the materials adduced by the Government are far from establishing that the civilian employees overseas are in fact preponderantly in the technician rather than in the clerical or mechanical class. And if it is in fact impossible to obtain for voluntary military service the few really skilled technicians that the armed forces require, then such persons can be drafted just as doctors are. Doctors are being drafted and have been required to serve in sub-professional capacities (*Orloff* v. *Willoughby*, 345 U.S. 83), although the Surgeon General has long had authority to employ unlimited numbers of contract surgeons in an emergency (10 U.S.C. § 4022(a) [1956 revision]). Whether the Doctors' Draft Act is "controversial" (U.S. Supp. Br. 37) cannot, of course, be answered with a flat Yes or No, but at any rate that law raises no constitutional question.

Fourth. In short, if, as the overseas commanders insist, they must have power to subject civilian employees to military law and discipline,[39] then the obvious and plainly constitutional method is to refrain from sending such civilians overseas, and to rely solely upon uniformed personnel to do whatever work is necessary at overseas military installations.

Thus the argument based on "practical necessities" that is so eloquently and indeed so vehemently presented comes only to this, that in order to economize on the difference between the expense involved in hiring 23,000 civilian employees, and that connected with recruiting or drafting the same number of military personnel, it is imperative to violate the Constitution by subjecting civilians to military law.

The values inherent in the Bill of Rights can not thus be measured by showing how many dollars might be saved by dispensing with its constitutional protections. And we submit that it is more than a little disturbing, at the very least, that there is shown to be such a thoroughgoing divergence between the justification presented to Congress for the presence of civilian employees overseas, and the justification for the same practice that is now presented to this Court.

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[39] It is relevant to point out that neither Admiral Good (U. S. Supp. Br. 115-120) nor Captain Walker (*id.*, 120-129) undertakes to explain how the Navy successfully operated its base at Guantanamo Bay for so many years without any similar powers (*supra*, pp. 62-63).

C. There Is No Showing That the Incidence of Crime on the Part of Civilian Dependents (as Distinguished From Civilian Employees) is a Problem of Any Magnitude, and Moreover the United States Under the NATO and NATO Type Agreements Has Yielded Primary Jurisdiction to the Receiving States Over All Criminal Offenses Committed by Dependents.

The practical solution for the problem of controlling civilian employees being to rely only on military personnel, we turn to the case of the civilian dependents who, we agree with the Government (U.S. Supp. Br. 30, [illegible]), cannot be militarized.

First. How much of a problem is presented by the possible criminal proclivities of civilian dependents? The figures of court martial trials of civilians that the Government has furnished (U.S. Supp. Br. 30-31) are not divided into civilian employees and civilian dependents, and to that extent are not meaningful in the present connection.

We venture to suggest that there have been very few trials of civilian dependents, and that there will never be occasion for many. In Iceland there were none over a four year period (U.S. Supp. Br. 130-131). Lt. Gen. Clarke, commanding the U. S. Seventh Army, admits (*id.* 130) that "court-martial cases involving civilian dependents are comparatively rare." We know that, from 1775 to 1950, the U. S. Army never tried a dependent wife, and that the first such trials took place in occupied territory where general courts-martial had the powers of military government courts (Covert Br. 64-65). And out of 9,620 cases docketed in the Court of Military Appeals through January 31, 1957, only four involved civilian dependents. This is only a little over 4/100 of one per cent. Two of those cases are now here; the third was that of Mrs. Brillhart, the Englishwoman tried in Eritrea who had to be paroled into this country to enter prison (Covert Br. 96-97; *supra*, pp. 25-26); and the fourth was Mrs. St. Clair

supra, pp. 101-102), whose sentence had been remitted by the time her case came before the Court of Military Appeals (No. 7760).

Plainly, this problem is not one of such magnitude that the Constitution must be wrenched and rewritten in order to meet it. But if wives can be tried by court-martial, so can children. The Uniform Code is plainly not adapted to the exercise of a juvenile jurisdiction; we pointed out why, in some detail (Covert Br. 89-90), and the Government, for reasons that seem only too plain, has not ventured disagreement on that score.

Second. The Government urges (U.S. Supp. Br. 41) that the matter should be "considered in terms of the present treaties [rather] than in terms of the interim arrangements * * * under which jurisdiction of the defendants in these cases was obtained."

We entirely agree, and we think it essential to point out that *under the present treaties the United States has already conceded to the receiving states primary jurisdiction over all crimes committed by civilian dependents.* The Government does not disclose this significant fact, which can easily be established.

1. By Art. I (1)(b) of the NATO Status of Forces Agreement (U.S. Reply Br. 32), "civilian component" means a civilian in the employ of an armed service, while Art. I (1)(c) defines "dependent" as the spouse or child of a member of an armed service or of a civilian component (*id.*).

Art. VII (3)(a) and VII (3)(b), set out at U.S. Reply Br. 36-37, provide as follows:

> "3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> "(*a*) The military authorities of the sending State shall have the primary right to exercise jurisdiction

over a member of a force or of a civilian component in relation to

"(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

"(ii) offences arising out of any act or omission done in the performance of official duty.

"(*b*) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction."

Thus, in relation to offenses committed by dependents, the receiving state has primary jurisdiction; the matter is perfectly clear from the explicit terms of the Treaty.[40] It is really amazing that Government counsel fail to disclose this significant circumstance to the Court.

A recent study by two disinterested scholars (Snee and Pye, *A Report on the Actual Operation of Article VII of the Status of Forces Agreement* (Georgetown Univ. Law Center, 1956) 43) calls attention to a similar oversight by American authorities abroad:

"The problem of interpretation of this paragraph arises from the omission of the term 'dependent' when paragraph 3(a) lists those over whom the sending state will have the primary right to exercise jurisdiction. As a matter of law, it would appear that the receiving state has the primary right to exercise primary jurisdiction, or exclusive jurisdiction in all cases where an offense is committed by a dependent. If the treaty is thus interpreted, we have the anomaly that if a soldier shoots his American wife, the United States has the primary right to exercise jurisdiction; while if the wife shoots her soldier husband, the receiving state has the primary right.

[40] The same provisions are now applicable in Japan. See Par. 3, Amendment of Article XVII of The Administrative Agreement with Japan, TIAS 2648, 4 U.S. Treaties 1846, 1848.

"The same problem arises in the interpretation of paragraph 5 of Article VII. This provides that the authorities of the two states shall assist each other in the arrest of dependents in the first section of the paragraph. It does not, however, in the last section, allow dependents in the custody of the sending state to be retained in that custody until charged by the receiving state.

"Some military authorities have as a matter of course considered dependents to be covered by the provisions of these articles, and in at least one country (Italy) we have seen reference to an Agreement prior to SOFA in which dependents are put on an equal footing with members of a force. In any event, we have seen no case in which foreign authorities claimed or American authorities admitted any distinction between dependents and members of the force in this regard. Whether the distinction in the provisions of Article VII was intentional or due to faulty draftsmanship cannot be determined by us without first having access to the working papers of the Agreement."

It may well be that the precedent for Art. VII of the NATO Treaty was the 1943 agreement with Egypt, which did not extend to dependents the immunities granted members of the forces. See pp. 75-76, *supra*. But, at any rate, regardless of the reason for the distinction, the plain terms of the NATO Treaty render completely irrelevant the present strictures directed at foreign trials and possible foreign imprisonment (U.S. Supp. Br. 33-34, 54-57). Those objections should have been voiced to the persons who negotiated the NATO Agreement on behalf of the United States.[41]

In this connection, it seems proper to point out once more (Covert Br. 106) that the arguments against foreign

[41] Those considerations should also be examined in the light of the case of Mrs. Brillhart, the British national tried by U. S. Army court-martial in Eritrea and now undergoing a sentence of life imprisonment at Alderson, W. Va., Covert Br. 96-97; *supra*, pp. 25-26.

trials that are now presented are considerably at variance with the extensive testimony given in the summer of 1955, by representatives of the Departments of State, Defense, and Justice, to the effect that the relinquishment of jurisdiction over Americans to the courts of the NATO countries was working satisfactorily. See *Status of Forces Agreements*, Hearings before the House Committee on Foreign Affairs, 84th Cong., 1st sess., on H. J. Res. 309 and similar measures, pp. 169-374.

Third. The problem of possible criminal acts by civilian dependents is, in view of their infrequent occurrence, essentially on a par with the problem of possible criminal acts committed by American diplomats abroad; and the latter has also been dealt with on a footing of waiver. No statute of the United States makes punishable a homicide committed by a member of the American diplomatic service in the country to which he is accredited, and his complete immunity from local process precludes his being punished under foreign law. But the situation arises so infrequently that, in the one instance of which we are aware, the United States cut the jurisdictional knot by the simple expedient of waiving the offender's immunity. See *Tyler Gatewood Kent*, 28 Cr. App. R. 23; *Ex parte Kent*, 323 U.S. 672; *A Report on the Case of Tyler Kent*, 11 Dept. of State Bull. 243.

Kent's crime was a security offense, the pilfering of classified documents from the American Embassy in London. The American authorities, *non constat*, the supposed considerations advanced at U.S. Supp. Br. 33, were perfectly content to let the British punish that security violation as a matter of British law.

D. Ample Practical Means Are Available to Punish Crimes Committed Abroad by Civilian Dependents of American Servicemen.

Let us suppose that, under existing treaty arrangements, an American woman kills her serviceman husband in a

NATO country, or in Japan where the same arrangements prevail.

First. Under those arrangements, as Art. VII (3) shows (*supra*, pp. 150-152), the authorities of the receiving state have primary jurisdiction.

Second. If, as we believe, such a civilian dependent cannot constitutionally be tried by court martial, legislation is necessary to make her triable in a United States court. But the obvious means is to make the offense triable in the same manner as any other offense committed abroad that Congress has declared criminal, viz., in the first district into which the offender is brought. 18 U.S.C. § 3238. This was, indeed, the precise suggestion made by Judge Tamm in the *Covert* case below (R. 132, No. 701).

To urge, as the Government seems to do (U.S. Supp. Br. 48), that this might "conflict with the venue provisions of the Sixth Amendment," is to overlook the provision of Art. III, Sec. 2, that "when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed," and to overlook as well the host of successful prosecutions in this country for treason committed abroad. Covert Br. 83, 104.

Certainly in today's air age, it is far simpler to provide for trial in the United States of an offense committed abroad than it ever was previously. Eight months elapsed between the killing and the trial in *United States* v. *Wiltberger*, 5 Wheat. 76; see *supra*, p. 18. In *United States* v. *Maro*, 27 F. 2d 518 (C.A. 3), the victim was struck in August 1924 and died in October 1924, yet the indictment against his assailant was not found until September 1926. See Brief for the Appellee in the *Flores* case, No. 567, Oct. T. 1932, pp. 37-39. And in *Flores* itself, the crime was committed in February 1930 but the indictment was not returned until September 1931. R. 2, No. 567, Oct. T. 1932.

The Air Force, which can now circumnavigate the globe in a mere 45 hours (*Washington Post*, Jan. 19, 1956, p. 1), should be at least equally resourceful in promptly bringing an accused overseas dependent into a constitutional forum.

Third. But it is said that justice must be prompt to be effective and that foreign witnesses cannot be subpoenaed (U.S. Supp. Br. 35). Neither objection carries the ring of conviction.

From date of act to date of final affirmance took over twenty-six months in the case of Mrs. Smith (Oct. 4, 1952, to Dec. 30, 1954; R. 1-2, 7, 52, No. 713); and the elapsed time from date of act to the decision of the Court of Military Appeals in Mrs. Covert's case was over twenty-seven months (Mar. 11, 1953, to June 24, 1955; R. 1, 97, No. 704). As long as military trials are governed by the standards of the UCMJ in preference to those of the 1917 Houston riot (*supra*, pp. 112-113), any talk about the deterrent effect of speedy justice as a reason for preferring a military to a civilian trial is just that: talk.

And in view of the facility with which the Government has consistently persuaded foreign witnesses to come to this country (Covert Br. 194), it is similarly only talk to conjure up the difficulty of securing their testimony.

Fourth. It is argued (U.S. Supp. Br. 46-47) that foreign countries will not permit persons in the situation of these two women to be returned to the United States for trial there. But as long as the victim was not a national of the receiving state, it is difficult to imagine that any foreign country friendly enough to want or permit American troops on its soil in time of peace is going to insist on trying an American woman in its own courts for an offense against an American national.

Fifth. Whether the foreign state would permit the establishment on its own soil of a United States court raises quite a number of problems.

There may well be opposition, as the Government argues (U.S. Supp. Br. 49-54), in countries but recently freed from the yoke of capitulations. But the British, who are perhaps as sensitive to any impingement upon their exclusive sovereignty and jurisdiction within their own domain as any people in the world, and who were at pains not to grant to American troops at the leased Atlantic bases complete immunity from the local criminal law (*supra*, p. 76), none the less did not shrink from the presence of an American court at those bases. Such a tribunal was clearly contemplated; here is Art. IV (4) of the Base Lease Agreement of March 27, 1941 (55 Stat. 1560, 1562):

> "(4) When the United States exercises jurisdiction under this Article and the person charged is a British subject, he shall be tried by a United States court sitting in a Leased Area in the Territory."

It is to be noted, also, that the concept of an American court abroad for the trial solely of civilian dependents of the armed forces does not involve a return to the capitulatory scheme of universal extraterritoriality, and that, from the point of view of the receiving state, there is really very little difference, either as a matter of law or of national pride, whether the American tribunal that sits there to try an American dependent for an offense against another American is a court-martial or a civilian court.

There is also a very real question whether the doctrine of *In re Ross*, 140 U.S. 453, viewed in the light of its only supportable basis (*supra*, pp. 69-70), would extend far enough to justify the creation of a consular or other non-jury civilian tribunal. But in view of the limited scope of the problem, we think that return to the United States for trial here of all serious offenses would doubtless constitute a less doubtful solution.

Sixth. So far as minor offenses by dependents are concerned, the deterrent effect of the threat of sending the offenders home would seem to be adequate. Certainly if Mrs. Smith can be threatened, as she was (R. 20, No. 713), with such a course as the consequence of requiring further hospitalization, it hardly lies in the Government's mouth to urge that petty offenders against police regulations cannot be similarly handled. That course was the traditional method of dealing with camp followers who were not amenable to military law. See Lee, *The Judge Advocate's Vade Mecum* (Richmond, 1863) § 22:

> "Where offences of a purely military character are committed by such persons, such as insolence to a commissioned officer, disobedience, or neglect of duty, though a court martial could not take cognizance of them, the offender may, nevertheless, be frequently sufficiently punished by dismissal from the camp . . ."

Seventh. Of course, as the Government quite properly states (U.S. Supp. Br. 41-42), the arrangements that can be made with foreign nations do not lie within American control. But since the United States has seen fit to concede primary jurisdiction over civilian dependents to the receiving state under the NATO Treaty, and must obtain a waiver to try such persons at all, the question is simply how that waived jurisdiction is to be exercised. That is a problem which, very obviously, has never been explored. That is a problem which, to judge from the Supplemental Brief, the Government is reluctant to explore. That brief renders all too obvious the Government's disinclination to seek a constitutional solution.

E. There Is No Constitutional Difference Between Civilian Employees and Civilian Dependents in Time of Peace.

On the third question put by the Court (352 U.S. at 902), whether there is any constitutional distinction between civilian employees and civilian dependents "for purposes

of court martial jurisdiction over civilians overseas in time of peace," to which the Government has answered (U.S. Supp. Br. 37-39) that there is none, we find ourselves in agreement with the conclusion, but for wholly different reasons.

The Government argues (*id.*) that all soldiers, employees, dependents must be treated alike because all are an integral part of the overseas force. While of course we cannot concur in this blurring of constitutional boundaries by mere assertion, no matter how variously repeated, we feel constrained by the authorities to agree that, since the determinative factor in time of peace is status, the functional aspect of the civilian employees must be deemed legally irrelevant.

It is true that, traditionally, the only civilians subject to military law even "in the field" were functionally connected with the forces. Winthrop, *1445 (reprint, p. 106); *supra*, p. 55. It is also true that, through 1945 and until 1950, no civilian dependent was ever tried by court martial. Covert Br. 61-65. And, in sharp contrast to the Government's present contentions, the Solicitor General only five years ago told the Court in *Madsen v. Kinsella* (U.S. Br., No. 411, Oct. T. 1951, p. 51) that

> "The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents, who bear no functional relationship to the occupying troops."

Just what has occasioned such a complete about-face since then is, understandingly enough, nowhere sought to be explained. But under the authorities already discussed at length (Covert Br. 36-91; *supra*, pp. 31-54), it is plain that, in time of peace, military jurisdiction depends on status, and that, as in the case of the post trader (Covert

Br. 45-47), even full functional connection with the forces is ineffective to subject a civilian to military law.

There remains, of course, the practical distinction already discussed: The functions now performed by the civilian employees, who commit the vast majority of offenses, can be turned over to military personnel who are subject alike to military command and military law. The civilian dependents, who cannot be militarized, are not shown to be a major crime problem.

F. There Is No Constitutional Distinction, With Respect to Court-Martial Jurisdiction, Between Major Crimes and Petty Offenses.

On the fourth question posed by the Court (352 U.S. at 902), "The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses," we also agree with the Government (U.S. Supp. Br. 82-95) that there is no relevant distinction, though again for different reasons.

We deem it unnecessary to embark on any detailed discussion of the power to try petty offenders by a civilian judge without a jury (U.S. Supp. Br. 83-88), nor to cite *O'Donoghue* v. *United States*, 289 U.S. 516, to correct the Government's strange assumption (U.S. Supp. Br. 86, 88) that Article III is somehow not applicable in the District of Columbia, essentially for the reason that, in our view, civilian dependents cannot be tried by court-martial at all in time of peace since such a tribunal cannot be given any power over them. We have already sufficiently elaborated the reasons for that conclusion.

The difference between major crimes and petty offenses committed by civilian dependents is essentially a practical one.

First. The basic background fact is that the United States has conceded primary jurisdiction over all offenses by dependents to the receiving state.

Second. For such few offenses as the civilian dependents commit, the obvious solution is to provide for trial in a United States court in the first district to which the major offender is brought, and to use the threat of being sent home to deter petty offenders.

Third. There is talk (U.S. Supp. Br. 57-61) about offenses which are not crimes by the law of the receiving state and which are not civilian crimes by Act of Congress but offend only against military orders. But until the Government can point out, as it assuredly does not do anywhere in the 133 pages of its Supplemental Brief, how a similiar situation is dealt with at military installations in the United States, or why a similar situation does not arise there, or how it handles possible security violations by over 350,000 indigenous civilians working at American military bases abroad (*supra*, p. 145), it does not seem necessary to dwell on that situation.

V. IN ANY EVENT, MRS. COVERT CANNOT NOW BE TRIED BY COURT-MARTIAL IN THE DISTRICT OF COLUMBIA

In its *Krueger* opinion last June, the Court noted (351 U.S. at 480) "that this case presents no problem of the jurisdiction of a military court-martial sitting within the territorial limits of the United States * * *." In the *Covert* case, however, where the Air Force proposes to retry a civilian woman by court-martial at Bolling Air Force Base within the District of Columbia, that problem is squarely presented; and it was duly saved in the Petition for Rehearing, pp. 8-10.

It is Mrs. Covert's position that, whatever the ultimate decision as to court-martial jurisdiction over her while she was in England as a person "accompanying the armed forces of the United States without the continental limits

of the United States" (Art. 2(11), U.C.M.J.), such jurisdiction ceased when she was returned to the United States by the Government and was there placed in civilian custody.

A. The Military Rule Has Always Been That Military Jurisdiction Ceases When Military Status Is Terminated by Affirmative Act of the Government.

In the *Covert* case, the Court last June said (351 U.S. at 492), "We hold only that military jurisdiction, once validly attached, continues until final disposition of the case."

That holding makes the Court more militarist than the military, for the military rulings, for more than ninety years prior to 1956, have never gone that far.

By way of preliminary, it should be pointed out that no disagreement is—or can be—expressed with the holding (351 U.S. at 491) that a rehearing is simply a continuation of the original proceeding. That proposition has never been questioned, and indeed was conceded at the hearing in the District Court. Tr. 10, quoted at Covert Br. 27, note 14.

By way of further preliminary, Mrs. Covert has likewise conceded that military jurisdiction is not lost where, pending trial or in the course of the proceedings, the soldier's term of enlistment expires, or the officer's tour of active duty ceases, or the officer's commission is terminated by operation of law. See Covert Br. 22, where the authorities are collected. Nor does Mrs. Covert contest the doctrine that a unilateral act of escape is insufficient to end military amenability. *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904, discussed at Covert Br. 26.

The present case, however, differs completely from all of the foregoing. What is here involved is an affirmative

act on the part of the Government that terminated the accused's military status. On that point, the military rulings have been unanimous since 1862. Any such affirmative act, at any stage of the proceedings, destroys military jurisdiction. See Covert Br. 23-25, where the authorities are collected and discussed.

Thus, an officer's release from active duty during the process of appellate review and before his sentence to dismissal has been confirmed (see pp. 84-85, *supra*, for the need of final executive action in such cases), terminates military jurisdiction and abates the proceedings. *United States* v. *2d Lt. Edwin R. Murray*, 62 BR 35; 5 Bull. JAG 278, ¶407(3), set forth at Covert Br. 24.

Similarly, in *United States* v. *Sippel*, 4 USCMA 50, 53, 15 CMR 50, 53, the Air Force proceeded on the basis that any administrative action directed at an officer whose commission had expired by operation of law might abate the pending appellate proceedings in its case, and accordingly took none. See discussion at Covert Br. 25.

Likewise, when court-martial jurisdiction over civilians was still limited by the statute to a particular period of time, viz., to a time of war, it was consistently held that "the jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*." Citations at Covert Br. 35. And where the offense—spying—was one that could only be committed in time of war, it was held that the trial could not take place after the war was over. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

So here, where the military jurisdiction was limited geographically, and where the Government assuredly does not contend that Mrs. Covert could be tried by court-martial as a member of the land and naval forces if her offense had originally been committed at Bolling Field; it is her position that the Government terminated any possibility of retrying her by court-martial, when, by its own

act, it brought her back to the United States. Once returned, she was no longer accompanying the armed forces "without the territorial limits of the United States." Once returned, she was in the United States and came squarely within the guarantees of Article III, Section 2, and of the Sixth Amendment.

To this the Government replies (U.S. Memo. 13), "The clear answer is that when the military services discharge, release, or muster out a member they demonstrate a definitive intention no longer to assert jurisdiction over him."

But the fallacy in the foregoing is the injection of a subjective element into what is entirely an objective matter. The military services are aggregations of many individuals and so can have no collective intent. Moreover, discharges are silent on intent. Certainly the officer who separated Lt. Murray (*supra*, p. 162) did not intend to make impossible the execution of that individual's dismissal; but the separation had that necessary consequence. So, in *United States* v. *Cooke*, 336 U.S. 210, the officer who discharged Hirshberg at the Brooklyn Navy Yard (R. 41, 127, 145; No. 231, Oct. T. 1948) certainly did not intend thereby to free that person from amenability to trial for his as yet undiscovered misdeeds, and the same may be assumed of the officer who gave Toth an honorable discharge. In both cases, however, the discharges necessarily effected those results, which, it may be ventured with certainty, were not results that anyone intended.

Where, as in the *Sippel* case (*supra*, p. 162) there is a genuine intention to retain jurisdiction, that intention can only be effectuated by refraining from doing the acts from which loss of jurisdiction flows.

Consequently, when the Air Force took Mrs. Covert out of an Art. 2(11) area and brought her back to the United States, its intention—if indeed it could be said to be

capable of an intention, or if any individual actually gave the matter any thought, which is more than doubtful, its intention, if any was immaterial. What was determinative was the circumstance that the Government by its own affirmative act removed her from the area where alone (under the present assumption) there was military jurisdiction over her. The Government thus terminated a military status that was geographically restricted, with the consequence that, once her original conviction was set aside, she could not be subjected to further military proceedings.

The Court's contrary holding on this point accordingly does violence to over ninety years of military rulings repeatedly made and consistently followed.

B. Placing Mrs. Covert in Civilian Custody Precluded the Exercise of Further Military Jurisdiction Over Her by the Very Terms of the Uniform Code.

The Court said last June (351 U.S. at 491), "It would be unreasonable to hold that the services retained jurisdiction of military prisoners that they kept in foreign countries but lost jurisdiction of prisoners confined in penal institutions in the United States."

And the Government in October argued (U.S. Memo. 13) that "When the Air Force returned Mrs. Covert to the United States in custody for the execution of her sentence, it was demonstrating its purpose to maintain and assert its jurisdiction over her."

Even if it be assumed at this juncture for purposes of argument that simple return to the United States does not defeat the further exercise of military jurisdiction, it is still true that neither of the quoted statements can survive examination of the statute. For the terms of the Code make it perfectly clear that confinement in a civilian institution, such as was imposed on Mrs. Covert (R. 3-4, 8-9, No. 701), destroys further court-martial jurisdiction in any event.

Unlike the Articles of War, AW 2(c) of which, from 1916 on, subjected to military law "All persons under sentence adjudged by courts martial," the Code by Art. 2(7) is applicable only to "All persons *in custody of the armed forces* serving a sentence imposed by a court martial." [Italics added.] See Covert Br. 30-32, where numerous references are collected and the legislative history is set forth.

When the Air Force placed Mrs. Covert into civilian custody it lost further jurisdiction over her just as if it had placed a discharged airman into similar custody. And if it be urged that military custody is in fact unavailable for female military prisoners, then that circumstance, if it be one, is appropriate for and only for submission to Congress, which has made military jurisdiction while in confinement dependent, not, as in 1916 to 1951, on the kind of tribunal adjudging the sentence being served, but on the kind of institution in which that sentence is being served.

It is proper to point out that the present question does not arise in the case of military personnel. There a dismissal or punitive discharge cannot be executed until the completion of appellate review (Art. 71, UCMJ), with the result that, in the event of a reversal followed by a rehearing, military status is not destroyed. The question arises only when the processes of the Uniform Code of Military Justice are sought, as here, to be applied to civilians for whom, it is impossible to refrain from saying, they are so obviously unsuited and inappropriate.

In that situation, the provisions of the Code show on their face that any surrender of the civilian "military prisoner" to civilian custody destroys further military jurisdiction. Therefore, once Mrs. Covert's conviction was set aside, the Air Force, which for reasons of its own had transferred her custody to three separate civilian agencies, ceased to have any further power over her.

Art. 2(7), UCMJ. The only reason why habeas corpus was not sought immediately upon her transfer to Washington was because, until the District of Columbia Circuit was reversed in *Toth* v. *Quarles*, 350 U.S. 11, the provisions of Art. 3(a), UCMJ, were still valid within the District of Columbia, so that military jurisdiction over her could have been reasserted thereunder.

C. The Rationale of Last June's Opinion in the Krueger Case, Sustaining Military Trials of Accompanying Civilians Overseas, Is Patently Insufficient to Sustain the Covert Holding That Such a Trial Is Proper in the District of Columbia.

In the *Covert* case, the Court last June (351 U.S. at 491,492) spoke of "military jurisdiction" and of "military prisoners", and cited the decisions of "military courts" in deciding that Mrs. Covert could be retried by a court martial in the District of Columbia. But the holding in *Covert* was expressly (351 U.S. at 488) rested on the *Krueger* decision, and the latter opinion was at pains (351 U.S. at 476) not to inquire into the extent of the Congressional power "To make Rules for the Government and Regulation of the land and naval Forces." Rather, the *Krueger* holding was that the Constitution did not require trial in a foreign country before a court conforming to Article III for offenses committed there by an American citizen, that Congress might establish legislative courts for that purpose, and that Congress could accordingly employ the existing system of courts-martial, without trial by jury, since similar procedures had been approved in other types of legislative courts established abroad.

That reasoning falls down completely when applied, as in the *Covert* case, to a trial by court-martial in the District of Columbia. For there the guarantee of jury trial applies in full force (*Callan* v. *Wilson*, 127 U.S. 540; *District of Columbia* v. *Colts*, 282 U.S. 63; *District of*

Columbia v. *Clawans*, 300 U.S. 617), and the courts of the District of Columbia, after a long period of uncertainty, have finally been held to be constitutional Article III courts (*O'Donoghue* v. *United States*, 289 U.S. 516).

Therefore, under the assumption underlying the present point, the circumstance that Ross of *In re Ross*, 140 U.S. 453, was properly tried overseas by a consul without a jury for violation of R.S. § 5339, does not mean that, if he had been returned to the United States before the proceedings against him had been completed, he could similarly have been tried by a consul in this country. Such an extension of the *Ross* doctrine would render meaningless within the United States the jury trial guarantees of the Constitution. And it is submitted that a similar extension in the *Covert* case of a military jurisdiction whose military basis is expressly put to one side would likewise nullify completely one of the most solemn of all constitutional protections.

Yet, if the Court's *Covert* opinion is permitted to stand undisturbed on this rehearing, then, within a very short time thereafter because the Air Force is determined to retry Mrs. Covert (*supra*, pp. 129-130), there will be presented the spectacle of a civilian woman on trial before a military tribunal in the District of Columbia, within the very shadow of the Capitol dome.

That will be the first such trial since that of Mrs. Surratt—which is hardly a pretty precedent, or one of which any American can be proud. But whereas, in that case the authorities responded to the service of a writ of habeas corpus by presenting to the judge an Executive Order which suspended the privilege of the writ (Moore, *The Case of Mrs. Surratt*, 58; Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators*, 250), in this instance they will be proceeding with the full approval of the highest court in the land.

What President Wilson said (*supra*, p. 53) of a similar proposal to extend military jurisdiction in the midst of a declared war seems equally applicable to such a course sought now to be justified because of a cold war:

> "I think that it is not only unconstitutional; but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America . . ."

CONCLUSION

The military jurisdiction over civilians that is involved in these cases cannot be supported as a proper exertion of constitutional power. Its present exercise not only violates express provisions of the Constitution, it is violative as well of every American tradition since the beginning.

The judgment in No. 701 should therefore be affirmed, and that in No. 713 should be reversed, with instructions to discharge Mrs. Dorothy Krueger Smith from custody forthwith.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 701. Oct. T. 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal From the United States District Court for the District of Columbia

No. 713. Oct. T. 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

FURTHER MEMORANDUM ON BEHALF OF APPELLEE AND RESPONDENT

In its Reply Brief for Appellant and Petitioner on Rehearing, hereinafter cited as U. S. 2d Reply Br., the Government presents historical evidence, so-called, in an endeavor to establish that the traditional British and American military jurisdiction over civilians at the time of the

adoption of the Constitution was not limited to those who served with the armies in a time of hostilities in the theater of hostilities.

That the jurisdiction was legally so limited was the view set forth by Winthrop, who wrote (1336; reprint, p. 101) that the application of AW 63 of 1874 "is confined both to the period and pendency of war and to acts committed on the theatre of the war." We have already shown (Covert Br. 39-41, 44) that this view was shared by other military writers, and, preeminently, that it was supported by published opinions of the Attorney General of the United States and of The Judge Advocate General of the Army.

We point out below that the materials now belatedly adduced by the Government, when examined in context, far from casting the slightest doubt on the traditional view, only confirm it. And we are impelled to file this additional memorandum, which is limited to that single issue, because the implications which the Government seeks to extract from its materials are so completely unsupported thereby that it is necessary to reply in a form more permanent than the essentially evanescent contradiction of oral argument.

I. THE CONTINENTAL CONGRESS PASSED NO ACT SUBJECTING CIVILIANS TO TRIAL BY COURT-MARTIAL FOR REFUSAL TO TESTIFY.

The quality of the Government's eleventh hour resort to "history" may perhaps be judged from its contention (U. S. 2d Reply Br. 58-60) that the Continental Congress in 1786, while considering a measure providing for "the punishment by court-martial of persons belonging to the forces of the United States who refused to give evidence before a court-martial, struck out the words "belonging to the forces of the United States", citing 30 J. Cont. Cong. 290. This is said to "reflect "a broad view of the reach of the court-martial power" (U. S. 2d Reply Br. 58), and the proposed measure is referred to as a "law" (*ibid.*) and as a "statute" (*id.* at 60).

If, in fact, an act with the words struck out had actually passed, then it would be necessary to determine whether the subsequent reenactment of the Continental Articles of War "as far as the same may be applicable to the constitution of the United States" (Sec. 13 of the Act of April 30, 1790, c. 10; 1 Stat. 119, 121) affected the provision in question.

But it is not necessary to pursue any such inquiry, for the reason that *there never was any such law or statute as the Government sets forth*, with or without the disputed words. Its quotation from 30 J. Cont. Cong. 390 at U. S. 24 Reply Br. 39 shows on its face that this was no more than the discussion of a committee proposal. In fact, *the passage on which reliance is placed never became, in any form a part of the Articles of War enacted 12 days later, on May 31, 1786.* For the text of what was actually passed, see 30 J. Cont. Cong. 316-322, and Winthrop 1501-1508 (reprint, pp. 972-975). Indeed, the failure or refusal of a civilian to testify before a court martial was not declared criminal by Congress until 1901, and then it was made an offense triable in the civil courts. Sec. 1 of the Act of March 2, 1901, c. 809, 31 Stat. 950. See H. R. Rep. 1853, 56th Cong., 1st sess.; Sen. Rep. 1914, 56th Cong., 2d sess. It has remained a civil offense ever since. AW 23 of 1916 through 1948; Art. 47, UCMJ, now 10 U. S. C. §847.

In short, the Government's last minute "historical" argument is rested on The Statute That Never Was.

II. THE PRACTICE IN BOTH THE BRITISH AND CONTINENTAL ARMIES DURING THE REVOLUTION DOES NOT REFLECT A MILITARY JURISDICTION OVER CIVILIANS WIDER THAN THE TRADITIONALLY NARROW SCOPE SET FORTH IN WINTHROP AND IN THE PUBLISHED OPINIONS OF THE ATTORNEY GENERAL AND THE JUDGE ADVOCATE GENERAL OF THE ARMY.

The bulk of the "newly-discovered materials" (U. S. 24 Reply Br. 24) now presented by the Government show only what was of course well known, that there were female

camp followers in both armies during the War of the Revolution. But since, as The Judge Advocate General long ago ruled (Dig. Op. JAG, 1880, p. 384; *id.*, 1895, pp. 599, 600; *id.*, 1901, p. 563), "strictly and properly, there can be no such thing as a camp follower in time of peace," the fact that there were camp followers in time of war, that rations were drawn for them, and that they were often dismissed from camp for misconduct (U. S. 2d Reply Br. 27-29, 31-36), proves nothing in the present connection, where we are concerned only with court martial jurisdiction over civilians in time of peace.

Turning first to the American materials, it is plain that the court martial jurisdiction in fact exercised during the Revolution over civilian employees dealt with persons who were functionally connected with the Army, and who were tried in time of war and in the field. U. S. 2d Reply Br. 37-40.

The Government fails to cite a single authenticated instance of the trial of a dependent wife by American court martial, even during the War of the Revolution within the camp of the Continental Army—i.e., in time of war in the field. U. S. 2d Reply Br. 31-37. Thus the Government's present belated attempt fails signally to contradict what we have repeatedly asserted (Covert Br. S. 38, 61-64, 69, 102; Def. Supp. Br. 41), that, over a period of 175 years, from 1775 to 1950, no wife of an American serviceman was ever tried by an American court-martial.

In the British service during the same period, there is shown one authenticated court martial trial of a wife, in Boston, in December 1775. U. S. 2d Reply Br. 30. But this occurred at a time when the British forces in Boston were besieged by the Continental Army (Spaulding, *The United States Army in War and Peace*, 36-40, 44-46), and after General Gage, the British Commander, had declared martial law (1 Ward, *The War of the Revolution*, 61-62). Thus this instance is, in the context of present-day concepts, a martial law situation.

There are six authenticated court martial trials of camp followers, not wives (U. S. 2d Reply Br. 31), all in time of war and in the field. And there are two instances of trials of wives in Canada in 1760 and 1761 (*id.* 30-31), but this was before the Peace of 1763, so that Canada was occupied enemy territory, subject to the laws of war. See Covert Br. 69-76, and note that *Madsen v. Kinsella*, 343 U. S. 341, which involved a similar situation, was not cited by the Court last June, because obviously irrelevant.

The Government's attempt to draw a wider significance from this handful of British trials on the basis that, "from the British point of view at least, there was no war, but merely disorder in the colonies" (U. S. 2d Reply Br. 27-28), breaks down utterly when it is borne in mind that the British accorded full belligerent rights to the American forces and treated captured American soldiers as prisoners of war, not as traitors levying war against the King. Similarly, although the Civil War and almost all of our Indian Wars took place on domestic soil, the United States at all times extended belligerent rights to the Confederacy (cf. *Williams v. Bruffy*, 96 U. S. 176, 186-187), and treated captured Indian hostiles as enemy soldiers who were answerable only to the laws of war. *United States v. Eleven Horses*, D. So. Dak., Winthrop *1212 (reprint, p. 778); *Case of the Modoc Indians*, 14 Op. Atty. Gen. 249.

Thus the British materials now adduced by the Government fail to present a single authenticated example of domestic military jurisdiction exercised over dependents' wives or indeed over any civilians, in time of peace and not in occupied territory or under martial law.

III. THE BRITISH PRECEDENTS SUBSEQUENT TO 1789 ARE PLAINLY IRRELEVANT TO ANY CONSIDERATION OF THE SCOPE OF AMERICAN MILITARY JURISDICTION.

At the last Term, the Government cited the case of a soldier's wife, convicted of manslaughter by a British court martial in India in 1825. U. S. Reid Br. 34, n. 16.

At the present Term, the Government sets out that case in more detail, and adds another British Indian case from 1825 and one from 1831 "in which court martial of an officer's wife *was considered*". Quotation from U. S. 24 Reply Br. 47-48; italics our own.

In view of the circumstances that all of these instances came long after the adoption of the Constitution of the United States, and that they involved the application of a special Mutiny Act operative only in India (St. 4 Geo. IV, ch. 81), we think it too plain for argument that they are completely irrelevant here. For, as the Solicitor General told this Court in *Madsen* v. *Kinsella*, (U. S. Br., No. 411, Oct. T. 1951, pp. 44-45),

> "the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court-martial jurisdiction then or later."

The circumstance that the Government now stresses the 1825 situation in India which, in 1956 it mentioned briefly and in 1952 dismissed as irrelevant reflects, we think, not the suddenly inflated significance of the British military jurisdiction in the days of the East India Company's vice-regal sovereignty, but rather the paucity of authorities from any other source that are available for citation in support of the Government's position in the present cases. Moreover, we think that the non-adoption by the Continental Congress of the British Article of War granting wider jurisdiction to courts-martial in certain overseas possessions (U. S. 24 Reply Br. 43-44) shows, not that the Continental Congress did not contemplate sending forces overseas—after all, it sent Arnold and Montgomery to Canada, where they captured Montreal and were only defeated at Quebec; and it sent John Paul Jones to harry British shipping in the enemy's home waters—but rather that the Continental Congress was unwilling to authorize a similar expansion of military jurisdiction over civilians. And,

Duncan v. *Kahanamoku*, 327 U. S. 304, should caution against acceptance of the too facile assumption that civilians in off shore territories can be subjected to a wider military jurisdiction than at home whenever convenience so suggests.

In any event, even English practices prior to 1776 must always be examined in the context of the provisions and limitations of our own Constitution, and in the light of our own constitutional development. Cf. *Powell* v. *Alabama*, 287 U. S. 45, 65. If, in fact, civilians were tried by court martial in British colonial possessions in the Eighteenth Century (a matter not at all satisfactorily authenticated—if, as we know, they were tried by court martial in British India in the Nineteenth Century; those circumstances would not and could not have any bearing on the scope of our own Constitution. After all, much of the Constitution, and almost all of the Bill of Rights, were aimed at practices contemporaneously lawful in England.

To rely on the type of British overseas cases here discussed as a guide for the meaning of the Sixth Amendment's guarantee of a jury trial is on a par with relying on the fact that no English prisoner charged with less than treason had any right to counsel prior to 1836 (Sec. 1, St. 6 & 7 Will. IV, ch. 114) as a basis for denying full scope to the same Amendment's guarantee of the right to the effective assistance of counsel.

IV. THE MATERIALS ADDUCED BY THE GOVERNMENT CONFIRM THE TRADITIONAL LIMITATIONS OF "IN THE FIELD" SET FORTH IN WINTHROP'S TEXT AND IN PUBLISHED OPINIONS OF THE ATTORNEY GENERAL AND THE JUDGE-ADVOCATE GENERAL OF THE ARMY.

The Government's attempts to establish a basis for the military jurisdiction which it now defends reflect, at the very least, no single consistent pattern.

At the last Term, the thread of the Government's argument was (U. S. Reid Br. 44) that "the world about which

Colonel Winthrop wrote no longer exists.'" At this Term, it evoked *The Federalist* (U. S. Supp. Br. 69-71). Now that its obvious misreading of the latter document has been exposed (Def. Supp. Br. 38-39), it once more shifts direction, and attempts to establish that Colonel Winthrop's world never existed at any time.

It now argues (U. S. 2d Reply Br. 41-58) that "in the field" was not limited to a time of hostilities, and that Winthrop was wrong when he wrote (*136; reprint, p. 101) that application of AW 63 of 1874 (Covert Br. 43) was "confined both to the period and pendency of war and to acts committed on the theatre of war."

We proceed to an examination of the Government's materials.

A. The Government points to three trials of sutlers not "in the field", in 1825, 1833, and 1838. U. S. 2d Reply Br. 51. The Government does not add, what is the fact, that this was in the period, 1821 to 1849, when the Army had no lawyers; the judge advocates provided for in Sec. 2 of the Act of April 14, 1818, c. 61, 3 Stat. 426, were dropped in the Army reorganization effected by the Act of March 2, 1821, c. 13, 3 Stat. 615, and the office of Judge Advocate of the Army was only reestablished by Sec. 4 of the Act of March 2, 1849, c. 83, 9 Stat. 351.

When the question of military jurisdiction over the post trader, successor to the sutler, was thereafter presented for a legal opinion, The Judge Advocate General held that such persons were not subject to court-martial except in the field in time of actual hostilities. See Covert Br. 46-47, where the ruling is quoted in full.

This the Government's present argument seems to be that a jurisdiction sporadically and episodically exerted, without legal scrutiny, establishes the incorrectness of a subsequent formal legal opinion which held that this jurisdiction could not legally be exercised.

Further comment would ordinarily be unnecessary, but we think it appropriate to remark that, in the nearly 500 printed pages of briefs filed by the Government since these cases were set down for argument, it has not yet made reference to, much less discussed, the published rulings of The Judge Advocate General of the Army as to the non-amenability of the post trader to court martial when not in the field. Dig. Op. JAG, 1880, p. 284; *id.*, 1895, pp. 599-600; *id.*, 1901, p. 563.

B. The Government next points to three trials by court martial of civilian employees in Utah in 1858. U. S. 2d Reply Br. 52. But it fails to establish that, in the context of the campaign in question (Rep. Sec. War, 1858 [Sen. Ex. Doc. I, part 2, 35th Cong., 2d sess.], pp. 6-8, 28-223), neither the offenses nor the trials took place while the forces were in fact "engaged in offensive or defensive operations" (14 Op. Atty. Gen. 22, 23) so as to be "in the field". Plainly, unless the Government can make such a showing, not even these isolated instances were beyond the traditional limitations.

And, in any event, the Government is demonstrably wrong when it refers to these three trials as taking place in "an organized camp in a remote place where the civil law of the United States was not functioning" (U. S. 2d Reply Br. 52). For Utah in 1858 was, and since 1850 had been, a fully organized territory, with a full complement of courts. Sec. 9 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 455.

C. The Government endeavors to draw comfort from scattered cases involving naval court martial jurisdiction from periods when privateering under letters of marque was still lawful, and when certain apparent civilians were deemed to have full naval status. U. S. 2d Reply Br. 48-50, 52; 55-56. It is difficult, if not impossible, to extract any settled doctrine from the isolated instances to which

reference is made, particularly since, as we have shown, the Navy never had any statutory jurisdiction over pure civilians prior to 1943, and for years operated its Guantanomo Bay base without power to try any civilians at all by naval courts. See the references collected at Covert Br. 51 and Def. Supp. Br. 62-63.

The Government's invocation of supposed maritime practice is particularly inapposite where it makes reference to the Coast Guard, prior to 1915 known as the U. S. Revenue Cutter Service, which formerly operated "public vessels manned by civilian seamen". U. S. 2d Reply Br. 49, n. 30a. The inference would appear to be that such civilians were subject to trial by court-martial. But the fact is that the Revenue Cutter Service for well over a century, from 1790 when it was founded (Secs. 62-64 of the Act of Aug. 4, 1790, c. 35, 1 Stat. 145, 175) until 1906 (Act of May 26, 1906, c. 2556, 34 Stat. 200), not only had no courts-martial of any kind, but was without any legal means of enforcing discipline on its ships. See Sen. Rep. 958 and H. R. Rep. 2749, both 59th Cong., 1st sess.

It is, we submit, dangerous to sail the seas of naval court-martial jurisdiction in the absence of adequate navigational aids.

D. This brings us to the contention (U. S. 2d Reply Br. 50-58) that the actual military practice with respect to trials by court martial was not as narrow as it was considered by Winthrop, and that the true limits of the jurisdiction was set forth in a memorandum of Judge Advocate General Holt in November 1866 (*id.* at 53).

It is to be noted that General Holt was the primary exponent of the policy of military control of political prisoners (9 *Dictionary of American Biography* 181, 182-183, s.v. Joseph Holt), so that his views as to the location of the boundary between the military and the civil jurisdiction must be read with caution, particularly where, as in

this instance; they were expressed before the delivery of the opinions in *Ex parte Milligan*, 4 Wall. 2, which were not handed down until December 17, 1866. See 18 L. Ed. 291.

When the issue of military jurisdiction over civilians was thereafter formally presented, both The Judge Advocate General of the Army and the Attorney General ruled that such jurisdiction could only be exercised in time of hostilities in the theater of hostilities. 16 Op. Atty. Gen. 13 and 48; and see, for the JAG opinions in digested form, Covert Br. 40-41, 44, and Krueger Br. 13. The opinions of The Judge Advocate General, now set forth in full (U. S. 2d Reply Br. 86-99), far from establishing the wider jurisdiction for which the Government is now contending, effectually deny it. And the full text of those opinions confirms the accuracy of Winthrop's text at *131-*138 (reprint, pp. 98-102).

To argue, as the Government does, that the reference in those opinions to trials condemned therein establishes a valid practice at variance with The Judge Advocate General's conclusions is on a par with urging that the trials of civilians by military commission that took place prior to *Ex parte Milligan*, see the references in Def. Suppl. Br. 122-124, establish the unsoundness of that decision. It is surely novel doctrine to suggest that a sporadic practice outweighs specific considered condemnation of its exercise. But that is the substance of the Government's present resort to "historical" materials.

The circumstance that the Government on the eve of the rehearing in these two cases has finally undertaken to assail the soundness of the views expressed by Colonel Winthrop may well evidence desperation. In any event, however, the materials which it adduces at this juncture are inadequate to the attempt. The views of that distinguished military lawyer, characterized by General Crowder as "the Blackstone of military law" (Covert Br. 33), far from

having been shown to be in error, are confirmed as not only accurate but as completely sound in every respect. See U. S. 2d Reply Br. 86-99.

Respectfully submitted.

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